

DO YOUR DIVORCE RIGHT

Straight Talk from Family Court Judges



Andrew Horton and John David Kennedy

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Andrew Horton

&

John David Kennedy

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We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break the bonds of affection. ...

The mystic chords of memory will yet again swell the chorus of the Union when again touched, as surely they will be, by the better angels of our nature.

— Abraham Lincoln

First Inaugural Address

March 1861

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Introduction

We are judges in Maine, where the family court is a division of the statewide District Court. We have two of the world's best jobs in one of the world's best places, but even in a relatively low-key place like Maine, we see people every day who have to make critical decisions in divorces and other family law cases. This book is written for people who aren't lawyers and who are thinking about going to family court, who are already involved with a family law case, or who have a family member or friend involved in a pending or active family law case.

Before becoming judges we each had varied legal experience. We have represented both the person seeking a divorce, and the person for whom the divorce was a great surprise. We have represented both victims and perpetrators of domestic abuse. We have represented individuals, large corporations and small businesses in state and federal courts.

As judges, we have presided over more than 10,000 trials or other courtroom events in family law cases. We know that a divorce is one of the most significant life changing experiences a person will ever live through. However, it is a process, not an event. The process goes on long after the legal aspects of the divorce are complete. The process operates on at least four levels—legal, emotional, financial, spiritual. This book attempts to address all of these levels in an interrelated manner.

We have tried to write this book in language that will make sense, but certain legal terms and concepts are unavoidable. At the very beginning of the book you will find a glossary which explains unfamiliar words and legal terms. You should refer to it whenever you aren't certain of the meaning of a word or phrase.

This book is a guide, and can only speak in generalizations about the legal process. Each family's situation is different, and will present its own issues. This book is not legal advice, and is not intended to serve as a substitute for individualized legal advice, tax advice, or professional mediation. Family law is, in general, left to each state to define and regulate, and the laws are very different from state to state. In the Appendices and Additional Resources, found at the back of the book, we have listed beginning points for getting the additional information you will need concerning your state's laws and

procedures.

There will likely be two kinds of readers of this book; those who read it from start to finish, and those who want the answer to a particular question or set of questions, and who go to the chapter that covers that topic. We have tried to deal with this by pointing out cross-references to other chapters in appropriate places, but some repetition is unavoidable. We apologize to those of you who read the whole book if you think we have been too repetitive at certain points.

Most of this book is written from the perspective that the reader is initiating a divorce without domestic violence and which is not, or at least is not yet, a high conflict case. In most chapters there are sidebars with additional information for specific topics including Domestic Violence; Children's Needs; High Conflict Cases; and the view from the point of the responding party.

We know and often say to the people who appear before us that "there is no such thing as an easy divorce. They are all hard, the only question is just how hard." Divorce is almost always a major emotional crisis for both parties and too often, it is a financial catastrophe as well. However, it is possible to weather those storms and emerge older and wiser but still well, and we hope this book will help you to do that.

As we will cover in a lot more detail, we think the keys to success are for you to carefully assess the situation at various points, to plan ahead, to focus on long-term issues, especially when children are involved, and at all points, to resist the temptation, however understandable, to get down in the muck with your former partner.

Acknowledgements

We have many people whom we need to thank for their help in getting this book to press. First, and most importantly, thanks go to our wives for reviewing drafts, making suggestions, serving as sounding boards, and for their patience through what has been a long gestational process. More importantly, our thanks go to them for sticking with each of us through the challenges that every long-term relationship experiences. Second, thanks go to our children, who also have had to show patience with fathers who have disappeared for “book meetings,” and who have helped us grow our spirits and immensely deepened our understanding of the human experience.

A number of talented professionals have generously given of their time and wisdom in serving as consultants or readers of our draft. They are: David Abramson, Esq., Tara Bates, Esq., Brenda Buchanan, Esq., Kathryn Dion, Rev. Jennifer Lentz, Hon. Joseph H. Field, Hon. E. Mary Kelly, Diane Kenty, Esq., Faye Luppi, Esq., Peggy McGehee, Esq., Bill Tobey and Hon. Joyce Wheeler.

We thank each of them for their contributions and suggestions, which have improved the product we offer you. Of course, it is our point of view which underlies the book’s foundation, and our readers do not share all those points of view. We are responsible for the general perspective of this volume and for any remaining errors, mistakes of fact or judgment, or other faults.

Our thanks also go to our publisher, Michael Lyons, our editor, Mary Anne Hildreth, and their staff at Tower Publishing. This book would not exist but for Mike’s faith in us, and Mary Anne’s professional assistance.

There are countless others we should thank, who have (often at some cost to themselves) contributed greatly to who we are, and who have been essential to the development of our views on life and the law. To our parents, grandparents, other family members, teachers, mentors, law partners, practicing attorneys, counselors, clergy, and the others who have helped us in this journey, you are too numerous to mention individually, but you know who you are, and you have our thanks and appreciation.

Finally, we want to thank our colleagues who sit every day in Maine’s courts. Over the past ten years, they have taught us how to be good judges, counseled us when we asked for advice, tugged us in the right

direction when we've been wrong, and engaged us in challenging but productive conversations about justice, application of the law, and how to best help the families we see every day. They are always and reliably there for us, and for the people of our state. They are our "happy few, this band of brothers" and sisters. They work without much public recognition and praise, but every day they put on their robes, take the bench, and quietly but competently battle to bring light and justice to the cases before them, and to hold back the forces of darkness in our society. We honor each of them and their dedication.

A.M.H. & J.D.K.

January 2011

Glossary

ADR: The acronym for *Alternative Dispute Resolution*, sometimes called Alternate Dispute Resolution or Appropriate Dispute Resolution.

Alternative Dispute Resolution: A catch-all term encompassing any means of resolving disputes other than through a formal court case, including *arbitration*, *mediation*, *early neutral evaluation*, and negotiation. Most state court systems sponsor various types of ADR and it is also available through private providers.

Appeal: A party's request that a higher court review the decision of the trial court in a family case. In most states, the appeals court will not overturn the family court decision unless it finds an error of law or an abuse of the judge's discretion.

Answer: In some courts, the document *filed* by the party who has been taken to court in response to the *complaint* or the *petition*. In this document, the answering party can state a response to the complaint, and tell the court what the answering party would like the court to do. In some courts, the answer is called *response*.

Arbitration: A means of alternative dispute resolution outside the court system, in which the parties agree, before or when the dispute arises, to present their evidence to a neutral referee, the *arbitrator*, who renders a decision that is binding on the parties and can be converted into a court judgment.

Case-in-chief: Each party's initial presentation of evidence through witnesses and exhibits. To be contrasted with a party's rebuttal evidence.

Claim; Counterclaim: A *claim* is simply a party's request to the court for a decision in favor of the party on an issue, such as a *claim* for child support or alimony or parental rights. The *claim* is stated in the Complaint or Petition. A *counterclaim* is a *claim* for relief made by the *defendant* or *respondent* in a court case in response to the *claim* or *claims* for relief of the *plaintiff* or *petitioner*.

Collaborative Divorce: In a *collaborative divorce*, the parties agree at the outset to make every effort to avoid a court battle by working out their issues outside the court. If successful, the parties will still have to go to court for approval of the divorce, but it will be an *uncontested divorce*. As an incentive to reach agreement in a *collaborative divorce*,

both parties' lawyers usually agree in advance that they will not represent the parties if the *collaborative divorce* process is unsuccessful, meaning that the parties will have to hire (and presumably pay for) new lawyers if they take their disagreements to court. *Collaborative divorce* agreements usually require the parties to engage in *ADR*, such as *mediation*, before either party can bring contested issues to court. Some lawyers specialize in collaborative lawyering, which is an essential component of *collaborative divorce*.

Complaint: In some courts, the *complaint* is the document that is used to begin a family court case. It is prepared and filed by the party who is starting the court case. Most courts have standard court forms that are used in family cases, available on-line at the court website or at the court clerk's office. The party starting the case can fill out the form and file it with the court clerk. The purpose of the *complaint* is to identify the parties to the case; to identify any children of the parties; to provide some history, such as how long the parties have been married; to tell the court why a party has brought the case, what the court is being asked to decide (such as dividing up property and deciding issues of custody of children), and to tell the court what the party who has started the case is asking the court to do. In some courts the *complaint* is called a *petition*. A *complaint* is different from a *motion* in that a *complaint* states the party's position, whereas a *motion* is a request for the court to do something specific.

Continuance: In many courts, the postponement of any court event is called a *continuance*, and a request to postpone is called a *motion to continue*. In other courts, a postponement is called an *adjournment*.

Conference: Many courts use this term to describe a discussion among the parties and the court about the case. Conferences are most often held at the courthouse, but also are held by telephone. The difference between a *conference* and a *hearing* is that the primary purpose of a hearing is for the court to decide issues in the case, whereas the primary purpose of a conference is to make sure the case is ready for an upcoming hearing, or to discuss scheduling or similar matters. Some courts allow conferences to turn into hearings if there are disputed issues that need to be resolved right away.

Decision: A catch-all term for a judge's oral or written ruling in a court case. See also *Order*, *Decree* and *Judgment*.

Decree: A term for the final order in a family case, essentially synonymous with *judgment*.

Default: Parties who fail to participate in the court process as required may forfeit their right to be heard, to present evidence, and to ask the court to rule in their favor. The term that most courts use in referring to that situation is default. A party can be declared in default for many different reasons, all based on the party's failure to do something required by the court. For example, a party can be *defaulted* for failing to respond to the complaint in time, for failing to provide documents or information during the discovery process, or for failing to come to court for a hearing.

Defendant: A term many courts use to refer to the party who has been taken to court by the *plaintiff*, the party that has started the court case. Other courts use the term *respondent* to refer to the party who did not start the court case.

Deposition: A *deposition* is an interview conducted under oath and recorded, usually by a court reporter, while a case is pending in court. Most courts allow depositions to be taken before trial during the *discovery* phase of a family law case, although some courts limit the number and scope of depositions. A party may take the deposition of the other party, but also may *depose* potential witnesses in the case to find out what their testimony will be. A *deposition* is usually held at the office of a lawyer or party in the case, not at the court. At the deposition, the party who initiated the deposition asks questions first, followed by the other party.

Discovery: Most courts allow, or sometimes require, the parties to a family law case to exchange information about each other. Parties can also obtain information from third parties in various ways. In most courts, this process of exchanging information between parties, and obtaining information from others, is called discovery. One party's request for information or documents from the other is called a discovery request.

Early Neutral Evaluation (ENE): A method of ADR not widely used in family cases but still potentially applicable. It involves the parties presenting their viewpoints and supporting information to a neutral person—often a mediator or arbitrator—who then gives the parties an evaluation of the strengths and weaknesses of their positions. ENE thus serves as a reality check for parties who would otherwise be headed to a trial in court.

Evidence: The body of information on which the family court's decision is based. *Evidence* can consist of the *testimony* of witnesses and also *exhibits*—documents and other items that are offered and

accepted into evidence. Every court has rules of *evidence* that define what kinds of testimony and exhibits can be accepted into evidence. Information and material that is not in evidence normally cannot be considered by the family court for purposes of its decision. See generally Appendix B for a discussion of evidence.

Family court: In our State of Maine, the court in which divorces and child custody cases involving parents who aren't married are heard is called the *Family Court*. Other states use other names for the same type of court. We use the term *family court* to refer to the court in your state—whatever that court is called—that handles divorce cases and child custody cases.

Filing: *Filing* papers means delivering papers to the clerk of court, by mail or by dropping them off in person. Some courts do allow some papers to be *filed* electronically on-line, and some courts allow papers to be faxed. *Filed* court papers are placed in the court's file for the case in question.

Findings; findings of fact: The court's factual decisions on contested issues.

Guardian ad litem (GAL): In family law cases, a person (often but not always a lawyer) appointed by the court to represent the best interests of a child. A GAL's work usually begins with an investigation of the child's situation—including interviews with parents, teachers, family friends and relatives and others who know the family, as well as a review of educational and medical records and other relevant documents—and concludes with a report to the court setting forth the GAL's observations and recommendations. The GAL may also be called to testify at trial on issues relating to the best interests of the child. The cost of GALs is often shared by parties equally or in proportion to income, although some GALs volunteer their services.

Hearing: This is a catch-all word for trials and other court events scheduled by the court at any time during a case. Usually the hearing held at the end of the case to resolve contested issues in the case is called a trial. The term "hearing" usually refers to events at court held earlier in the course of a case, although the final step in an *uncontested divorce* is often called a hearing. A hearing may or may not involve the testimony of witnesses under oath. Sometimes it may simply involve the parties or their lawyers presenting arguments as to what the court should do, without any witnesses.

Hearsay: A major rule of evidence, followed in most courts, that

prevents second-hand information, whether contained in witness testimony or in a document or other record, from being accepted into evidence to prove that the information is true. The *hearsay* rule generally prevents testimony that the witness “heard” someone “say” something, if the testimony is being offered to prove that what was heard was true. The *hearsay* rule is full of exclusions and exceptions. For example, anything said or written by the opposing party is usually not considered *hearsay*, meaning that such statements can be used against the party. The *hearsay* rule is discussed in depth in Appendix B.

In pro. per.; in propria personam: Some courts use these terms to refer to parties who are representing themselves, without lawyers, in family cases. Other courts refer to these parties as *self represented litigants*. See also *pro se*.

Judge: In many family courts, the *judge* is responsible for conducting the trial and other court proceedings, making rulings on evidence and other procedural matters, and for making decisions on contested issues of fact and law. Some family courts use other terms such as *magistrate* and *master*.

Judgment: The final decision issued by the trial court in a family case. Some courts refer to their judgments as “decrees” or “final orders.” Because a family court judgment usually reflects the court’s final decision on all issues, a judgment can be appealed, whereas an order issued while the case is ongoing usually cannot be appealed.

Litigant: A catch-all term for someone who is a party in *litigation*, meaning a contested court case.

Litigation: A catch-all term for any type of court case, including a divorce or other family case, other than a criminal case. An issue is in *litigation* when it is the subject of a contested court case.

Magistrate: In some courts, the judges in family cases are referred to as *magistrates*. In other courts, *magistrates* handle limited matters under the supervision of judges. Magistrates are known by other names in various court systems, including *commissioners* and *marital masters*.

Master: In some courts, the person who acts as a judge is referred to as a *master*, conducting *hearings*, making *rulings*, and rendering *judgments* in contested family cases. In other courts, *masters* handle limited issues under the supervision of judges.

Marital and non-marital assets: *Marital* assets and debts are generally

debts or assets (whether held only in one name or not) that were acquired or created during the term of the marriage. *Non-marital* assets or debts are generally those held in one party's single name before the marriage—such as inheritances or gifts—so long as they have not been transferred to joint ownership at some point or combined with *marital* assets. What is considered to be *marital* or *non-marital* property will vary from state to state.

Mediation: Many courts require parties to try to work out their differences by agreement before asking the court to hold a hearing and resolve them. The process often used to help parties come to an agreement is called *mediation*. Mediation is basically a facilitated conversation among the parties and their lawyers, if either or both have lawyers. The mediator is the facilitator. Like a judge, the mediator is neutral and takes no sides. Unlike a judge, however, a mediator has no power to make decisions or issue orders. Instead, the mediator's job is to help the parties make their own decisions—together, by agreement.

Motion: A *motion* is a request for the court to take some specific action. Examples: A motion to modify child support is a request for the court to change the level of child support, up or down. A motion to continue is a request to postpone a court event. A motion to extend is a request to move a court deadline to a later date.

Order: Any document reflecting a decision of the family court during a case. Orders can be as simple as extending a deadline, or as complicated as deciding issues of parental rights, property and alimony during a case. An order is different from a *judgment* or *decree* in that an order is issued during a case, whereas a *judgment* or *decree* is issued at the end of a case and usually reflects the court's decision on all issues.

Party: Someone whose rights and obligations are being decided in a family court case. Another term for *party* is *litigant*. The party who starts the court case is often called the *plaintiff* (in some courts, the *petitioner*). The party who has been taken to court is often called the *defendant* (in some courts, the *respondent*). Parties can be people other than the spouses or partners. Grandparents, foster parents and others can sometimes become parties in family cases.

Petition: In some courts, the document used to begin a family court case. (See *complaint*).

Petitioner: A term some courts use, instead of *plaintiff*, to refer to the

party who has started the court case.

Plaintiff: Many courts use this term to refer to the party who has started the court case against the *defendant*. Other courts use the term *petitioner* to designate the party who initiated the court case.

Pretrial conference; pretrial order: Before a family case comes to trial, most courts follow a process designed to make sure the trial goes fairly and smoothly. A pretrial conference is a meeting at which the parties and the judge go over the contested issues that will be the focus of the trial, the witnesses and documents that the parties will be presenting, and other matters. A pretrial order is often issued by the court after a pretrial conference, and it sets deadlines and other requirements for the parties to meet before trial, such as deadlines for exchanging and filing their lists of witnesses and exhibits.

Pro se: The Latin term—meaning “for oneself”—that many courts use to refer to parties who represent themselves in court without lawyers. For example, such a party might be referred to as a *pro se litigant*, or as proceeding *pro se*, or as a *self-represented litigant*.

QDRO (Qualified Domestic Relations Order): A special supplemental order that tells an administrator of a pension plan how to allocate a portion of a person’s pension to the other partner.

Referee: Some courts use this term to refer to family case judges. In other courts, referees are essentially *arbitrators* who conduct hearings and make recommendations to judges on what the decision in contested cases should be.

Relevance, relevant: The rule of *relevance* is a rule of evidence that defines and limits the body of information that the court may consider in a case. To be admitted—meaning accepted—into evidence, information has to be *relevant*—meaning that the information has to have some bearing on a contested issue in the case. Many family courts follow the federal rule of evidence that defines *relevant evidence* as evidence that makes the existence of a contested fact more probable or less probable than it would be without the evidence. *Relevance* is discussed in detail in Appendix B.

Res judicata: A legal doctrine—the Latin phrase means “the thing decided”—that prevents a party in a court case from re-litigating—raising in the court case—an issue that the same or another court has already decided. For example, if a divorce judgment awards a vehicle to one party, the other party normally cannot bring up again the issue

of which party should be awarded the vehicle. The doctrine of *res judicata* is applied more narrowly in family court than in other areas of law, because parties are often able to re-litigate issues like child custody and alimony if there have been major changes in circumstances since the original court decision. However, the doctrine of *res judicata* would still prevent a party from re-litigating previously decided issues unless the party could prove a major change in circumstances.

Respondent: A term some courts use, instead of *defendant*, to refer to the party who has been taken to court by the *petitioner*.

Retainer Agreement: When someone hires a lawyer, often the terms under which the lawyer is working for the client are spelled out in a *retainer agreement*. A typical agreement defines what work the lawyer has been hired to perform and the payment terms for the work. *Retainer agreements* can contain other provisions.

Ruling: A catch-all term for a judge's decision in a case. A ruling can be on a limited issue, such as whether to admit particular testimony into *evidence*, or a ruling can be on an entire issue, such as the court's *ruling* on alimony.

Self-represented: A synonym for *pro se* and *in pro. per.*, referring to a *litigant* who is representing herself or himself in court, without a lawyer. See *pro se*.

Serve; service: To *serve* papers means to deliver them in person or by mail (or in some courts by e-mail) to someone other than the court clerk, usually the other party. Generally, anything you file with the court has to be *served* on the other party. Some courts require proof of *service*, meaning a certification by you that you have mailed or hand-delivered the papers to the other party. Some court papers have to be *served* in a special way. For example, most courts require the initial papers in a family case—often called the *summons*—to be delivered by a sheriff or other legal officer. Other papers, such as letters to the court, or motions, often can be served simply by mail (or e-mail if allowed) or hand-delivery to the other party. You should check the rules of your court, or ask the clerk about what is required.

Subpoena: A court order for a witness to come to court, or during the *discovery* phase, to come to a *deposition*. *Subpoena* in Latin means “under penalty.” A person who is *served* with a subpoena can be punished with jail if the person fails to obey it.

Summons: A court order that is *served* by the *plaintiff* on the *defendant*, along with the *complaint* (or *petition*) at the beginning of the court case. The *summons* orders the defendant to respond to the *complaint* or else lose the opportunity to be heard. Unlike a *subpoena*, a civil summons does not result in jail if it is ignored. Instead, a defendant who fails to respond to a summons likely will be *defaulted*—lose the right to be heard in court, and the court likely will give the plaintiff what the plaintiff is asking for. Each court has rules for how the plaintiff must arrange for the summons to be served, and also for how the defendant must respond to the summons. Usually the summons itself spells out how a defendant must respond, and sometimes the summons sets a deadline for the defendant to file a response with the court, if the defendant wants to be heard in court and not defaulted. Therefore, a defendant should read the summons and complaint very carefully, and respond if necessary within the deadline set, or at least file a written motion to extend the deadline.

Trial: A trial is any court hearing that involves the testimony of witnesses on contested issues, although usually it refers to the hearing held at the end of a case, covering all contested issues.

Uncontested divorce: A divorce case in which the parties have reached agreement on all issues, so that all the court has to decide is whether to grant the divorce on the agreed terms.

Witness: Someone who testifies in a court hearing or trial. The parties can be witnesses and the parties can also present testimony from others. Witnesses who are not parties are sometimes called non-party *witnesses*.

Chapter 1

Assessing Your Situation

“To ask the right question is already half the solution of a problem.”

— Carl Jung, 1934

T

he decision to separate, or to begin a divorce from your partner, is likely one of the most important decisions you will ever make in your life. While it is not always true, most people treat a decision about whether or not to get married as a very serious matter and often prepare for a long period of time between when that decision is made and their actual marriage date. During that time there are ample opportunities to review one’s potential compatibility with a partner, each partner’s respective life goals, and their attitudes about the many issues they will have to face together once married.

Unfortunately, in our experience, many people do not bring the same reflection and depth of analysis to the decision to terminate a marriage or other committed relationship.

In this chapter we pose a number of questions and have you review some checklists to help you identify many of the specific questions and issues you will have to address if you do decide to get a divorce.

Although this chapter is written mainly for people considering or embarking on divorce, unmarried partners who are considering or embarking on separation may also find it helpful.

Where Are You at This Point?

Have you already decided for yourself that you are going to get a divorce?

Even if you believe that you have already thought through all of the issues you should evaluate in deciding whether or not to get a divorce, we encourage you to review this chapter. It may well be that we will introduce topics that you have not considered, provide additional detail or perhaps raise additional questions related to topics that you have already reviewed.

Have you and your spouse together decided that you are going to get a divorce?

You and your spouse may have already begun to discuss the possibility of getting a divorce. You may have reached the conclusion that it is in both of your interests to do so. If so, we commend both of you on beginning this process in a cooperative way. However, there may be topics that you have not considered or your consideration of certain topics, especially finances, may not have been fully realistic. We encourage you and your spouse to review this chapter as well.

Are you unsure whether or not a divorce is the best answer for your situation?

We suspect that most of the readers of this book will fall into this category. Hopefully, after you have gone through this chapter and answered our questions, you will have a better sense of what course might be right for you.

Researchers who have looked at how divorce happens in our society tell us that one party (the initiating party) is often one year to 18 months ahead of the other party in processing either the possibility of divorce or the reality that the initiating party may be close to initiating a divorce that the responding party will be opposed to. We have seen many cases where the responding party feels as though the divorce has come “out of the blue,” even though significant warning signs have been present for some time.

In all of these possible situations, we suggest that you conduct a six-part assessment, evaluating the following questions:

- Is domestic violence a factor in your relationship?
- What will the effect of a divorce or separation be on your children or other family members?
- What is your financial situation now? What is your financial situation likely to be once a separation occurs or a divorce is completed?
- How will the laws in your particular state affect how your divorce is conducted and what the result may be like?
- What the effect of a separation or divorce may be on your emotional health?
- What the effect of a separation or divorce may have on your spiritual well-being?

Domestic Violence

We begin with the topic of assessing domestic violence and your relationship. Since the presence or absence of domestic violence in a relationship is an issue of extreme importance, we need to take a detour and refer you to an explanation of what we mean when we use that term in this book. Even if you believe that domestic violence is not an issue in your relationship, we suggest you at least scan the Domestic Violence sidebar and consider taking the sidebar quiz. If it is at all an issue in your relationship, then carefully read this section, and also our Chapter 2 on Separating, and consider getting help with your situation.

Domestic violence is usually, but not always, characterized by two major components; first, the existence of a pervasive power and control relationship and second, violence perpetrated against one partner by the partner who is seeking to maintain control. In most domestic violence (DV) cases the violence is physical. In other cases, it may not be physical; it may be verbal or emotional. Nevertheless the presence of any violence, coupled with a pattern of unbalanced power and control in a relationship meet our criteria for a case in which domestic violence exists.

In a typical DV relationship, one partner exercises significant power and control over the other—telling the victim what to wear or not to wear, controlling household finances, limiting and closely monitoring the victim's contact with family and friends, and enforcing this control by threats or actual violent acts. The police may have been called to the house on a number of occasions, and there may well have been prior criminal charges, civil “protection from abuse” actions, restraining orders, or all of the above. In most cases in which a party physically abuses his or her partner, domestic violence exists whether or not there is an accompanying pattern of power and control. However, domestic violence can occur by power and control without an incident of physical abuse.

In many DV situations, the victim makes a number of attempts to escape the relationship, but does not pursue those attempts to a conclusion, so there may be a number of prior protection actions that have been dismissed, or criminal cases where the state has dropped the charges because the victim does not want them pressed. However, it is more and more common for prosecutors to proceed to a trial with or without the victim's cooperation, especially if there is a third party witness or other external proof such as a 9-1-1 tape.

Not every act of physical violence necessarily constitutes domestic violence. For example, if two spouses have a long-standing relationship (where issues of power and control have not been a major factor) and an argument unexpectedly escalates into a situation in which one party shoves the other party and that behavior is not repeated, that shove may well constitute assault (which is a crime in every state), but nonetheless, in and of itself, may not constitute domestic violence.

However, these are the rare exceptions to the general rule that any kind of assault is domestic violence. If you have been a victim of any kind of assault by your intimate partner, it is far more likely that you are in a domestic violence situation than not, and you should evaluate your situation with that as your primary concern.

The Wedding Dress & The Naked Husband

I sat on a case in which the wife, significantly upset over her husband's affair, sat at home drinking and reviewing the couple's wedding photographs. As she had more to drink, she decided to put on her wedding dress and then awaited her husband's return. When the wayward husband came home, an argument ensued and the unfortunate (and by then really drunken) woman punched the husband. The police were called, and they correctly determined that the woman was the primary aggressor. As a result, they arrested the wife, and issued her a summons for assault. (There had been no violent behavior before this single incident nor was there any behavior of this kind later. There was no pattern of power and control in which either party had significantly restricted the other's activities or access to family and friends.) The woman ultimately pled guilty to a misdemeanor assault and was placed on probation on the condition that she receive appropriate alcohol counseling, which she did. Similarly, I presided over a lengthy divorce trial where the parties' separation was triggered by an event in which each party was arguing with the other, where there was likely some pushing and shoving by one party or both, but where the husband ultimately wound up removing all his clothes and stood in the apartment screaming, at which point the police were called. The husband was arrested and charged with assault, and ultimately received a deferred disposition with a counseling requirement, which he successfully completed. He was then allowed to enter a no contest plea to disturbing the peace. In each case, the single uncharacteristic assault does not meet our definition of domestic violence.

— J.D.K.

Even if you have never been the victim of physical violence but you

feel as though your spouse has been emotionally abusive, please take the quiz and review the power and control wheels located in the next sidebars. A pattern of unbalanced power and control is domestic violence. *Whether or not there has been actual physical violence in the past, the use of power and control by one party over another is a strong indicator of the danger of physical violence in the future.*

Are You Afraid?

If you answer YES to one or more of the following questions, you may be experiencing abusive behavior:

- Do you often feel like you are walking on eggshells to avoid upsetting your partner?
- Do you feel like a prisoner in your own home, unable to come and go as you please?
- Does your partner follow you, or show up at your work, school or friends' homes?
- Does your partner put you down or call you names?
- Does your partner threaten or intimidate you, physically or verbally?
- Does your partner ever force you to have sex when you don't want to?
- Does your partner refuse to practice safe sex, putting you at risk of contracting STDs?
- Does your partner get jealous when you spend time with family or friends?
- Does your partner often accuse you of sleeping around?
- Does your partner monitor your actions and force you to account for your time?
- Is your partner violent with your children or your pets?
- Does your partner threaten to take your children or call DHS on you?
- Does your partner act like two different people (i.e., Dr. Jekyll and Mr. Hyde)?
- Does your partner insult your racial, ethnic, cultural, religious, or

class background?

- Does your partner humiliate you through actions or words privately or in front of others?
- Does your partner threaten to reveal your sexual identity to your family, work, or faith community?
- Does your partner ever slap, shove, grab, hit, kick, punch or restrain you against your will?
- Does your partner ever say, “I can’t live without you,” or “I’d kill myself if you ever left me.”?
- Does your partner minimize or deny things that s/he has done to you?

If you are being abused, you are not alone. The violence and abuse is not your fault. Abuse occurs in all communities, to people of all ethnic/racial, faith, political, socio-economic identities, to people of all levels of ability, all ages and sexual orientations and occupations.

Source: Family Crisis Center, www.familycrisis.org (used by permission)

Few of us like to admit that we may have made bad decisions in our choice of partners or relationships. It is almost always easier in the short run to minimize, explain away, or ignore physical violence or power and control issues. This can be very dangerous as one never knows whether the controlling partner will go beyond what has already happened, and escalate to the next level.

If you believe that you have been a victim in a relationship in which there has been domestic violence of any kind, or if you are unsure about this question, we again urge you to contact your local domestic violence project and seek their assistance. Domestic violence projects exist in almost every city or county of the United States. (See Appendix F for a list of resources.) These projects have trained advocates who are able to expertly evaluate whether domestic violence is present in your relationship and to give you appropriate practical and legal advice. If you have any doubt whatsoever about this issue, we strongly urge you to contact your local DV project, and to do so at a time and place where your partner will not be aware of the contact. *Do not put your personal safety at risk.* However, we understand that not everyone will be willing or able to take this step. At a minimum, if you believe that you are in this situation you should

develop a safety plan that spells out ahead of time what you will do to protect yourself, or your children, or both if your situation worsens.

[1]

Finally, if you are in an abusive or domestic violence relationship, some of what we advise in other situations *does not apply* to your situation. For example, if you are a victim of domestic violence, we do not—*repeat, do not*—suggest trying to work out agreements directly with the other party about finances or the children, nor do we suggest that you utilize a mediator. Instead, negotiate through your lawyer, or don't negotiate at all. The power imbalance inherent in any domestic violence situation means that genuine compromise through direct negotiation is impossible.

Financial Assessment

One of our colleagues has calculated that on average the cost of maintaining two households after separation is at least 170% of the cost of maintaining the pre-separation household. In our society, there are very few relationships in which the partners are putting 35% of their net monthly pay in the bank every month. Unless you are fortunate enough to be in one of those households, or unless there are significant and relatively liquid funds available to you either from the relationship's joint assets, or from other sources, it is almost inevitable that a separation or divorce will cause both you and your partner significant financial hardship in the short and medium terms. This is the unpleasant reality of separation and divorce. The financial hardship will increase dramatically if you have to have a contested court hearing to resolve some or all issues in your case.

What you need to do is to face this reality and honestly evaluate your financial situation. To do so you have to evaluate what your financial situation (including your own earning ability) will be if you separate from your partner, and if you are married, to honestly evaluate whether or not either you or your partner will realistically be able to assist the other in supporting a new household by paying spousal support or alimony. (We are assuming that child support will be calculated according to your state's guidelines, and actually be paid. If not, the financial crunch will be even worse.)

We have included some worksheets to help you assess your finances. The first set constitutes a balance sheet in which you add up all of the assets and debts in your household. We then have you identify any assets or debts which would likely be assigned to your spouse as “non-marital”[2] in your state. You can then determine how much in assets

and debts you and your partner will have to divide up or assume responsibility for. [3]

Worksheet number 4 has you construct your best estimate of your current joint household budget.

Worksheets 5 to 8 help you construct budgets for two households, each to be maintained by you and your partner after a separation. These worksheets will require you to make estimates of future costs. [4] *It is important not only that you realistically assess what your situation is or will be, but also that you assess as realistically as possible what your partner's situation will be.* If you have an expectation that your partner will be providing some or all of your support on either a temporary or permanent basis, and if your partner does not have the ability to do so, you will be unprepared, and a crisis will follow. [5]

Family court judges are not naive, and often see parties trying to manipulate the financial picture. One example of this is what we refer to as “SAIDS,” that is, “Suddenly Acquired Income Deficiency Syndrome.” We know that a higher earning partner may seek to manipulate her or his income during the time a divorce action is pending as a tactic to reduce the support that a court might order to be paid to the other party. The lower earning partner may minimize his or her ability to earn income, again on a short-term basis, in order to maximize the support that he or she may be entitled to. As a result of these dynamics, many family court judges think that the pattern of income and earning ability that was present in a household before a separation, or before the beginning of discussions about a separation, is the most accurate predictor of real income and future earning capacity. You probably know your partner as well as anyone, and can assess how likely he or she will be to use these kinds of tactics. If your assessment is that this kind of behavior is likely, this is an important indicator that you should have a lawyer to help you.

Especially if a family has young children, it is also common for partners in a relationship to divvy up responsibility, so that one party is primarily responsible for bringing in the income the family needs to survive, and the other party is primarily responsible for caring for the children. In years past the husband was usually primarily responsible for the income and the wife was usually primarily responsible for child care. *Times have changed*, and there are now many families with working moms and stay-at-home dads, or same-sex couples in which one partner takes the income earning responsibility and the other takes the primary childcare responsibilities. Similarly, there are many families in which both parties assume an equal, or close to equal,

responsibility both for generating income and for child rearing.

When one partner has been out of the workforce for some period of time, there are often significant re-entry problems, even if one's availability for work is no longer an issue when the children are grown and gone. Any partner who has been out of the workforce for a long period of time will almost certainly need to upgrade or refresh old skills, or perhaps return to school to develop new ones. If you are in that situation and if you are uncertain whether or not your partner is likely to provide support for you to make these adjustments, you should consult with a vocational expert, employment agency, job service office or other reliable local source so that you will have a realistic sense of your current earning potential and ability to find work.

Even if you are relatively certain that your spouse will provide some kind of support to you for either the short or long term, you need to be aware of the likely tax implications. Child support is not tax deductible to the payor of support and it is not taxable income to the person who receives the support. On the other hand, spousal support or alimony is tax deductible to the payor of that support and is taxable income to the recipient. However, unlike a typical wage situation, there is no deduction or withholding set aside for payment of taxes as the spousal support is actually paid. The recipient partner has to plan for this and put aside whatever portion of the support that will be necessary to pay the state and federal taxes that apply to his or her tax bracket. If you are the recipient, and fail to do this, there will be an unpleasant surprise when your tax return has to be filed in the following year. If you do not have the necessary funds available to pay the tax bill, significant penalties and interest will begin to accrue. It is highly unlikely that a court will require your partner to pay these taxes, penalties and interest, in any situation.

Finally, each partner, or the partners together, must realistically assess whether bankruptcy is an option, or if it may be unavoidable. While the federal bankruptcy laws have recently changed, and it is now more complicated and difficult for a person or a couple to discharge their debts, there are many cases in which the divorce triggers a bankruptcy filing by one or both of the parties. This can occur before, during or after the divorce, and is likely to have a large impact on the family court case. For example, if the court in a divorce judgment allocates responsibility for some of the joint debts to the husband, and he subsequently declares bankruptcy, unless the wife has also declared bankruptcy, the creditors still have the right to seek payment of those bills from the wife; not half of each bill, but the whole thing. Some

divorce obligations, such as alimony and child support, are non-dischargeable in bankruptcy, meaning that a bankruptcy does not eliminate responsibility for those obligations. If you or your spouse are considering filing, or have filed, for bankruptcy, make sure you understand the effect of the bankruptcy on the divorce. [6]

Financial stresses are one of the most common reasons that relationships flounder. Sometimes financial stresses cause the unhappiness between the partners. Other times, some other unhappiness between the partners causes one of them, or both, to ease their sadness by binge shopping. This can start a cycle of increased disputes when those new bills come due. In the worst-case scenario, these further arguments result in cycles of even more binge shopping. So, which came first—the chicken or the egg? Of course, the answer is: It does not matter, the debt is a burden and friction point either way.

In our experience, most households in our society, whatever the partners' incomes, large or small, carry an unhealthy amount of consumer credit debt. We have a general rule we have used over the years. Leaving aside secured debt, (that is, debts which are secured by an asset the creditor gets an interest in, such as a mortgage, home-equity line or automobile loan) and focusing only on consumer debt, (that is, credit cards and unsecured personal loans), if the ratio of joint debt to joint annual income exceeds 25%, it is highly likely that the parties will be unable to escape from the debt burden by repayment, and bankruptcy is a likely outcome. (Worksheet #2 will help you calculate this ratio.)

Emotional Assessment

A person who is thinking about a separation or divorce has to assess the state of his or her own emotions and those of the partner. As we have often observed, there is no such thing as an easy separation or divorce, and every person who goes through one of these processes will experience some degree of pain, and often a significant level of psychic distress. You need to assess your ability to handle that stress and pain.

It may be that you have been unhappy with your relationship for a long period of time. Especially if there are no children in your family, a separation or divorce may actually improve your state of mind and emotional health. However, more commonly (and almost always if there are children involved) there will be at least a short-term disruption of both partners' equilibrium and emotional health.

So long as domestic violence is not a consideration, as long as there is not another intractable problem such as untreated mental health issues, chronic alcoholism, other substance abuse, or a gambling addiction, we suggest that some pre-separation exploration of the state of your relationship in joint counseling is a good investment of some time and money. In some cases the trained professionals who facilitate couples counseling are able to help the parties shift the internal lenses through which they perceive themselves, their partners and their problems, and to make the improvements in a relationship that make a separation or divorce unnecessary. If domestic violence or any addiction or mental illness is present, couples counseling may not be useful, until or unless the underlying issue has been resolved.

Even if this is not so, and the couples counseling simply clarifies or reinforces your or your partner's desire for a separation or divorce, you are likely to feel better in the long run by knowing that you went the extra mile and did everything that you could to avoid prematurely terminating your relationship with your partner.

In our experience every person who goes through a divorce or other family court process should at least consider whether to get professional assistance from a qualified therapist or mental health professional. Let us repeat that: *every person who goes through a divorce or other family court process may benefit from professional assistance from a qualified therapist or mental health professional.* We know that this part of your life is a time when money will be short, but, as the oil filter commercial used to say, this might be a “pay me now, or pay me later” issue.

Many people think that helpful conversations with their friends or family members can serve just as well as appropriate professional therapy. This is often not so. Friends and family members are not trained in helping people to evaluate and then integrate the necessary insights about themselves that must go with a major life change such as this one. Unfortunately, family and friends can serve as a kind of a chorus whose well-meaning and uncritical support can block necessary self-examination and insight. Remember, these people are hearing the story of your relationship only through your lens. They are not hearing the other side of the story. As people who love or care for you, they are not likely to be objective. They can reinforce your own misperceptions or unrealistic expectations. If you rely only on their advice, you may wind up expecting or hoping for things that no judge is likely to order.

Legal Assessment

In order to make a realistic assessment about how your separation or divorce might proceed, you need to have some sense of the how's and why's of the domestic relations laws in your state. Without at least a basic understanding of these laws, you will be unable to assess whether or not your partner's proposals for resolving your situation are fair or not. You will be unable to realistically assess what you might be awarded if your case is not resolved by agreement. Even more importantly, if you do not have a basic understanding about the laws in your state, you may be willing to enter into an unfair agreement that relieves your partner of legitimate obligations for which he or she should be responsible.

Of course, the easiest way to make a realistic assessment is to have a conference with an attorney who is licensed to practice law in your state. Some attorneys are willing to initially consult with a person who may become a client without charging a fee for an initial conference (usually an hour, or less). Others will do this for a small fee. You can learn a lot about your situation in that time. It could be that the attorney will advise you that you can handle your situation on your own or with only a modest expenditure for some “unbundled” assistance.^[7]

However, such a consultation may not be possible in your community. Your situation may be complicated enough that an attorney will not be able to give you even basic guidance unless he or she knows that you will become a client and pay an initial retainer. However, there are many other sources of information that can help you assess the basic legal framework in your state. In the Additional Resources section at the back of this book we have listed state-specific resources that we have been able to locate, such as “*Do Your Own Divorce*” books or websites. Other possible sources of basic information include local legal services programs, Bar Association lawyer referral services or self-representation materials published by your court system.

In any event, before you begin, you should know the answers to such basic questions as whether your state treats property as “community property” or whether you are in an “equitable distribution” state. You should know if there is a presumption in your state as to whether spousal support will or will not be awarded for a marriage as long or short as yours. You should know whether or not your state favors joint custody or joint residence arrangements, or whether its laws are weighted in favor of giving one partner most or all of the decision-making authority, or primary residence of a child, or both.

It happens regularly in divorce court that one party wants out of the

marriage so desperately and so quickly that she or he is willing to give up everything rather than prolong the process by disagreeing with the other party about anything. This approach is understandable but it may be short-sighted. If you ignore your rights and your future needs for the sake of getting divorced quickly, you may be making a serious mistake.

You Have to Know Your Rights

I conducted an initial case management conference in a divorce case a few years back. (Our family court sets up one of these conferences automatically whenever any new divorce with children is filed. It's an opportunity for the judge to figure out what the issues are likely to be and to put the case on an appropriate track tailored to the nature and complexity of those issues. See Chapter 8 for more information.) In this particular case, the husband was a career police officer who was very familiar with how the courts operate and with the outlines of family law in our state. The wife had been a stay-at-home mom and was very unsophisticated and had no knowledge of the divorce laws or her rights. Dad had the whole thing wired, at least in his mind. He had written a completely one-sided settlement agreement, gotten her to sign it and came to court hoping to finalize an uncontested (and highly unfair) divorce before any questions could be raised.

After asking preliminary questions to figure out what the issues were, I figured out what was going on and said, "Well it seems there are two big issues here, what to do with the house and the equity in it, and how to divide Mr. Smith's pension." The mom then looked at me and said, "What has his pension got to do with me?" She was unaware that under the law of our state (and virtually everywhere else) the portion of his pension that was earned during the marriage was presumed to be joint marital property. Unless there was an offsetting allocation of other assets she was entitled to half of it.

I explained this to her, and strongly suggested that she consult with a lawyer of her choosing. Unfortunately, this story does not have a happy ending. She did not do so and ultimately accepted a small lump sum instead of her share of the pension. While judges can and do refuse to accept grossly unfair agreements, we cannot and do not act as advocates for one party or the other. Ultimately, we have to allow people to make what appear to be bad choices, so long as they are informed of what they may be giving up and still choose to do so. Of course, people should and do have the right to make bad economic choices for other good reasons. We don't know the whole story. It may be that the mom wanted to end the marriage at all costs to protect her or her children's physical safety. If so, this may have been the right decision.

Spiritual Assessment

Perhaps the most ignored element of the process of separation or divorce is a spiritual assessment. In most of these cases (whether or not the parties are formally married) at some point in the relationship there was genuine love and affection felt toward the other person. As a result, the undoing of the relationship is certain to cause disappointment and heartache. Additionally, if the parties are married, they made an explicit lifetime commitment to each other which one or both parties are choosing to abandon.

As importantly, if there are children in the family, whether or not the children are the biological children of your partner, there is a significant disruption to bonds that they have established, usually at huge cost to the children. We will speak of this cost to the children at length in other chapters of this book. But for now, leaving the best interests of the children aside, the disruption of the children's bonds with the other partner and their disrupted feelings of attachment, safety, and stability will have significant side effects on *you*. You will be called upon to give them even more love and emotional support than you have in the past.

We suggest that the spiritual aspects of any proposed separation or divorce need to be assessed and a plan developed as to how you will help remedy any damage in this important part of your life. Perhaps pastoral counseling from your minister or other clergy will be of help. If you have not had a routine of attending the church, synagogue or mosque of your choice, now could be a good time to begin such a practice, even if you only maintain it until you have passed through the divorce process.

If you believe in God or a personal higher power, you will likely agree that daily calm and reflective prayer will help you through this difficult time in your life. If you are not a believer in a divine presence that cares about your individual life struggles, you should review one of the many studies that demonstrate that a daily routine of meditation both invokes the “relaxation response”[\[8\]](#) and improves one's state of mind.

If you are in a religious tradition that prohibits or disfavors divorce, you know that this will add another layer of difficulty to your situation. At a minimum, you will not be receiving the same level of spiritual and emotional support that others might expect from their

minister or congregation. Some, or perhaps even all, of the members of your family of origin may disapprove of your decision, or worse. In the most extreme situations, members of your family or church might seek to intervene, or to prevent you from going forward if a divorce is your decision. If so, in addition to everything else in your life being disrupted, you will have to develop other sources of spiritual support.

Like most events in our lives that touch us deeply, every difficulty presents an opportunity. While a divorce or separation would be a significant emotional and spiritual disruption, it would also be an opportunity for significant emotional and spiritual growth. A separation or divorce constitutes a shift to a new way of living, and is an opportunity to reflect on the events and personal attributes that have contributed to the termination of an important personal relationship. Informed reflection, with or without the help of appropriate pastoral care or other therapy, can lead to new insights about yourself. These insights can help you ensure that you do not repeat any negative patterns which might cause the failure of any future intimate relationship.

Better Friends Than Spouses

When I came into the courtroom to handle an uncontested divorce, the parties were together, holding hands. I said, “Are the two of you sure you want to get divorced? I can certainly put this off if you’d like more time to think about it.” They smiled, and the wife said, “We know we need to be divorced. We’re going to be better friends than spouses.” I said, “There’s nothing that says you can’t be friends—in fact, we who work in the court system appreciate it.” So we went ahead. At the end, the court security officer and I watched them leave the courtroom, still holding hands.

— A.M.H.

The Big Decision—Whether to Proceed

You have completed all of your assessments, and have a realistic view of all of the facets of your situation. Now, you have to come to the sticking point—should I stay and see if this relationship can be improved, or is it time to leave?

No one can ever answer this question but you. It is also neither a completely rational decision nor a fully emotional one. Both your head and your heart have important roles in a decision of this magnitude. As the French philosopher Blaise Pascal once wrote, “The heart has its reasons that reason knows not of.”

While no one can make the decision for you, there are things you can do to help.

There are also things that will work against your interests, which you should definitely NOT do.

Things that can help:

- Complete your assessments.
- Write down lists of pluses and minuses.
- Talk with a trusted mentor.
- Talk with a trained counselor.
- Have a discussion with your oldest best friend.
- Sleep on it.

*Things **not** to do:*

- Make a decision impulsively.
- Make a decision when infatuated with a possible new partner.
- Make a decision just after another major life change or event.
- Chat on-line.
- Find a new lover on-line.

Finally, the worst possible combination:

- Find a new love online, end your current relationship in favor of an internet romance with a virtual stranger, quit your job, pack up your things and your children, and then move out of state, with no notice to the children's other parent, and with no job or source of income, to join your new love, about whom you likely don't know much at all.

We can almost hear our readers laughing. Who would pursue such an absurd fantasy? Who could be so besotted with hope? The answer is: more people than you would think. We know, because we have seen more than a few of these sad cases in our courtrooms.

Separation Quiz

While no book or chart could set out a “one size fits all” road map for a decision of this complexity, we do offer a quick quiz that is really designed to help you review your decision about whether a separation is appropriate. No quick quiz can be a substitute for careful analysis of your overall situation.

However, the following quiz can be a review checklist for you.

You begin this quiz with 500 points

___ Is my partner a domestic abuser? (If yes, + 2,000)

___ Does my partner have a serious substance abuse issue? (If yes, + 300)

___ Is my partner willing to get evaluated and if indicated, accept treatment for this? (If yes, -100)

___ Do I have a substance abuse issue? or

___ Does my partner think I have a serious substance abuse issue?

(If yes to either, + 300)

___ Am I willing to get evaluated and if indicated, accept treatment for this? (If yes, -100)

___ Does my partner have a serious mental health issue? (If yes, + 200)

___ Is my partner willing to get treatment for this? (If yes -100)

___ Do I have a serious mental health issue? (If yes, + 200)

___ Am I willing to get treatment for this? (If yes, -100)

___ Am I happy in my relationship? (If yes -400)

___ Do my partner and I have a child or children together? (If yes, - 200)

___ Do I think my partner is a good mother or father? If yes, -200)

___ Will my child or children be resentful if we separate? (If yes, -200)

___ Do I have financial resources to support myself for at least 3 months without help from my partner? (If yes, + 200; if no -200)

___ Does my partner have financial resources to support him/herself for at least 3 months without help from me? (If yes, + 200)

___ Will my partner and my incomes be able to cover the cost of two households? (If yes 0; if no, -200)

___ Will my partner and my incomes be able to cover our debts, or at least minimum payments on it? (If yes 0; if no -100)

___ Is there a place I can stay for awhile at no or low cost? (If yes, + 100; if no -100)

___ Do I have a secure job? (If yes + 200, if no -200)

___ If I separate will I continue to have medical insurance? (If yes + 100; if no -100)

___ Will my children? (If yes + 200; if no -200)

___ **TOTAL**

If your total is less than 500, you may want to think twice before deciding to proceed with a divorce or separation.

Conclusion

If your assessment leads you to conclude that the benefits of a divorce do not clearly outweigh the costs, you should proceed cautiously and see if there are ways to rehabilitate your relationship. Five thousand dollars spent on a trip to Hawaii that is successful in recharging your and your partner's emotional batteries is money better spent than for an initial retainer to a lawyer.

Alternatively, if the problems in your relationship are not likely to be fixed, the cost of the trip would be better spent on the inevitable initial costs of separation and, perhaps on an initial retainer for counsel as well.

At the end of the day, only you can make this judgment. Having said that, a judgment of this importance should never be made impulsively. When one's decision making is impaired, or without adequate reflection and planning.

Chapter 2

Separating (or Not)

“Sometimes I wonder if men and women really suit each other. Perhaps they should live next door and just visit now and then.”

— Katherine Hepburn

T

his chapter is for people who are separating from their spouses or partners, or who are considering it, or whose spouses or partners are separating from them. The focus is on how to separate or be separated from. This chapter starts at the point at which one or both of the parties to a relationship decide that it should end, or at least be put on hold for a time.

The first half is meant to help people decide how to separate, primarily in terms of what strategy to use in particular situations. For example, should you try to negotiate the terms of separation or not? Does it make any difference if children are involved? What if one of the spouses or partners wants to separate and the other does not?

The second half covers the legal aspects of separation. It describes separation agreements: what they cover, when they are appropriate and when they are not. It also describes the court procedures available to address separation issues and when to use them. Along the way, it addresses questions like: Does a separation agreement have to be in writing? Can there be a separation agreement but not a court case? Can there be a court case without a separation agreement? What if the spouses or partners cannot agree on some or all of the terms of separation? If there is a court case, should it be a divorce case, a judicial separation case, or (for unmarried partners) some other type of court case?

How to Separate

How people separate often sets the tone for everything that happens afterward and in extreme cases can make a life-or-death difference. Separating is a critical phase that should be planned carefully and thoughtfully, but it often happens impulsively and sloppily. It is common for a divorce that could have been resolved in a fairly friendly way to turn nasty because one (or both) of the spouses acted

badly in the process of separating.

Is there a best way to separate from someone? Yes, at least in theory, the best way to separate is to do whatever is best calculated to take you from where you are today to where you want to be in the long term. Where you are today and where you want to be long-term are unique to you, so the journey from here to there is likewise only yours to make. There really is no one-size-fits-all solution to how to handle a separation.

Sometimes the most beneficial approach is to be open and honest about everything and trust that you and your partner will be able to work things out. In other situations, to be open and honest about separating is literally to put your life at risk. The rest of this chapter is meant to help you think through and work out the best approach for your situation.

Separated For Life

I know two people who were married young, separated many years ago, live apart, have had other relationships and have moved on from each other in every way, except that they have never bothered to get divorced. Why? I have never asked. It seems to work for them.

— A.M.H.

Separating: The Best of Times, The Worst of Times,

The Most Important of Times

How people separate can be a critical factor in determining whether the relationship ends well or badly, and whether disagreements are successfully negotiated or resolved by a court battle.

The potential for a good ending, if it exists at all, is probably never greater than during the process of separation. Separating in an atmosphere of mutual trust and respect dramatically increases the chances that the divorce will be amicable, and may even enhance the chances of reconciliation. In fact, even when only one partner wants to save the relationship, that partner's wisest strategy often is to affirm the other partner by agreeing to a trial separation instead of opposing it.

On the other hand, the potential for separation to trigger bad endings is enormous. Strong emotions and impulses often are at a peak when two people separate. Time after time, otherwise reasonable and well-meaning people engage in seriously foolish, even criminal, activity when they are separating from their partners or their partners are

separating from them. If the relationship involves domestic violence, separation can be lethal for the victim.

Domestic violence experts know that the time when people separate can be the most dangerous time for a victim of abuse. Why? Because domestic violence is based on the abuser's power and control over the victim. When the victim shows signs of leaving, the abuser may lash out in an effort to intimidate, retaliate or maintain control. If you are a victim of domestic violence, your first step should be to get help from your local domestic violence project before attempting to separate.

Even when domestic violence is absent, family court judges see too many divorce cases that could have been worked out in a friendly way become legal battlefields because one or both spouses behave badly during the separation, poisoning the prospects for peace.

For all these reasons and more, whether you are the partner who wants to separate or the other partner, separation needs to be approached carefully, cautiously, deliberately and rationally. Every step you take should be with a particular goal in mind, rather than based on impulse or emotion. In other words, you should develop and then act upon a *separation strategy*. What strategy people use in separation depends almost entirely on their assessment of their situation.

If you haven't read Chapter 1, and gone through the assessment process, we recommend you do that now, before you read any more of this chapter. What approach you should take on almost any choice or question that presents itself in your relationship or in your divorce depends largely on your situation. Only you truly can decide what approach to separating is best. Always remember: *Separation is inherently about you and your partner, not just about you.*

Once you have assessed your situation, the rest of this chapter can help you think through and work out the best way for you and the other person to separate.

The Four Rules for Separating

There are just four rules for separating:

First, if you have any doubt about how your partner will react to the separation, take steps to protect yourself and your children. See the *Safety Plan* sidebar for suggestions on how to do that.

Second, separate in the way best calculated to fulfill your long-term goals for the situation. In other words, don't use the separation as a vehicle to express anger, to retaliate, or to satisfy another need in a way that may feel good in the short term but will make the situation worse. Instead, use separation as a building block for the future. Think strategically: figure out where you would like you and your partner to be (or not to be) five years from now and work backward.

For example, if you and your partner have young children, you will most likely need to have some kind of relationship with your partner five years from now, so that you can be parents together after the divorce, even if you are not together as a couple. Working backwards from that, you need to avoid doing long-term damage to your ability to communicate with the other parent. On the other hand, if you don't want or need to have any kind of relationship with your partner five years from now, burning your bridges today in the course of separating is less of a concern, although there may be other reasons not to do so.

The third rule is to conduct yourself as if everything you said and did were going to be printed in the newspaper. If your case goes to trial in court, what you say and do in the course of separating may be reviewed under a microscope by the other party or his or her lawyer, and could be laid out as evidence in the courtroom. Your statements and actions during the separation will determine whether the evidence reflects favorably on you or not. So, bite your tongue, delete that nasty e-mail message before you send it, resist the urge to retaliate—in the long run, you will be glad you did.

The fourth rule is, whatever your situation, and whether you are the party initiating the separation or the other party, you need a *separation strategy*.

What is a Separation Strategy?

A *separation strategy* is a simple concept: it is simply a plan for separating from the other party, whether you are the party initiating separation or the party being separated from. We could call it a separation plan instead, but we like the term *separation strategy* because it implies the level of foresight and thoughtfulness that we think is necessary.

Note that a separation strategy covers the separation process only, meaning the transition from living together to living apart, although a person may or may not use the same strategy for the court phase of a

divorce. Also, the separation phase may overlap with the court phase. The next section reviews the types of separation strategy so you can decide which is right for you.

The Two Types of Separation

People separate from each other every day of every year in many different ways, with or without a separation strategy, but there are essentially only two ways to separate, and there are essentially only two types of *separation strategy*.

- One type of separation involves communicating with the other party. The parties try to work out the terms of the separation, with or without the help of lawyers or other third parties. We call this type a *negotiated separation*.
- The other type of separation involves not communicating with the other party. In this type, one or both parties act unilaterally, by doing what they need to do (or want to do) without consulting the other party or seeking the other party's agreement. We call this type a *unilateral separation*.

The reality is that most separations involve some negotiation and some unilateral action, so your *separation strategy* does not have to be based entirely on negotiation or entirely on acting without the agreement of the other party. The key is to be deliberate and intentional about how you approach separation.

What is the Best Separation Strategy?

To repeat what we said above, the best separation strategy for you is what is most likely to get you from where you are to where you want to be. Thus, your strategy depends on both you and your goals and the other party and that party's goals and methods. Having said that, we do have preferences and ideas on separation strategies.

All things being equal, we prefer a *negotiated separation strategy* over a *unilateral separation strategy* for two major reasons. First, people often act unilaterally out of selfishness or out of anger, and unilateral separations tend to breed court battles and long-term hard feelings. Situations that could be resolved by agreement become poisoned when one or both parties behave badly. When children are involved, unilateral separations sometimes expose the children to parental conflict or worse. Second, negotiated separations tend to produce fairer outcomes and salvaged relationships. When children are involved, negotiated separations are more likely to leave the two

parents able to communicate and make decisions together—able, in other words, to be parents together as their children need and deserve them to be.

People who are open to reconciling are able to reconcile more easily when they separate on mutually agreeable terms. Even when they do not reconcile, the divorce is more likely to be achieved without an expensive and destructive court battle. Our experience is that when conditions permit it, it is almost always better in the long run to make an effort to work things out in the areas where give and take is appropriate.

On the other hand, clearly some situations do not lend themselves to a negotiated separation. The essential ingredient for meaningful compromise is a relationship in which the parties deal with each other from positions of approximate equality, without either party being afraid, intimidated, overwhelmed, or silenced by the other. If that ingredient is missing, then conditions are likely not right for the parties to work things out on their own. That's where lawyers come in handy. Those situations include:

- Situations in which one party is abusing or intimidating the other cannot and should not be resolved through negotiation. The victimized party needs to take unilateral action to get out of a bad relationship. If you are in that situation, see our *Safety Plan* sidebar for how to protect yourself.
- Situations in which one party has all or most of the power and leverage, be it financial or emotional or otherwise, often cannot be fairly resolved through negotiation. Situations in which one party has an illness or disability may similarly result in an imbalance in power or leverage. Negotiations when there is a gross imbalance in bargaining power are not likely to result in a fair agreement.

Choosing the Right Strategy or Mix of Strategies: Some Illustrations

Sometimes people separate by using a combination of negotiation and unilateral action. For example, one of the parties may leave the house, taking with her what she needs (or wants) without consulting with or trying to negotiate with the other party. So far, this is a *unilateral separation strategy*. After leaving, that party switches to the *negotiated separation strategy* to work out who will pay the bills, who gets what bank accounts, who gets to have the children on what days, etc.

How to choose the right strategy, or mix of strategies for you? The next section illustrates different scenarios that may shed light on what strategy, or combination of strategies will work for you.

Protecting Yourself Against Domestic Violence or Abuse

If you are the victim of domestic violence, or if you are afraid of your partner even though physical violence has not occurred, your separation strategy must be all about protection, not negotiation, at least until you are safe. You need to follow a unilateral separation strategy. Do not try to negotiate or work things out, at least until you have taken whatever steps you need to take, *unilaterally*, for your own protection. You should also focus on protecting yourself if you have any concern about how your partner will react to the separation. Once you are safe and protected, you can always consider changing strategies and opening negotiations on the issues remaining, although if at all possible you should not negotiate directly with the other party and instead work through a lawyer if you have one.

If you are in a relationship involving actual or potential domestic violence, you should do two things immediately, even if you are not ready to leave: first, get advice and support if you can do it safely, and second, develop a safety plan for your own protection and that of your children. If you are ready to leave, you must have a *safety plan* to ensure that you and your children are protected and also to meet your and their future needs. Even if you are not ready to leave, you may be forced to leave for your own safety and that of your children, without any time to plan, so the time to plan is now.

Our *Safety Plan* sidebar spells out the essential ingredients of a good *safety plan* in detail, so that you can design one on your own if you must. However, your first step should be to get advice and support, if you can do it safely, from your local domestic violence shelter or advocacy group. You can locate your local agency by calling the National Domestic Violence Hotline at 1-800-799-SAFE or 1-800-787-3224 TTD. The Hotline will give you a referral to your local agency. Local domestic violence agencies also can be found through the Yellow Pages or Internet search engines listed under “domestic violence help,” “domestic violence shelters,” “human services organizations,” or “crisis intervention.” In emergencies, call 9-1-1 or your local police or call the state police emergency line.

The Safety Plan

Everyone who has been or might become a victim of domestic violence must have a safety plan for protecting themselves and their

children from harm at the hands of the abuser. Here is an outline for what should be covered in a good safety plan. Write it out and leave it in a place where the abuser will not find it, or with a friend or other third party if there is no safe place in the home:

Planning Within the Home:

PHYSICAL EXITS FROM THE HOME: Identify in advance the ways you can safely leave the house quickly if you need to, meaning which doors, windows, elevators, stairwells or fire escapes you will use.

LIST OF LOWER RISK PLACES IN THE HOME: If you sense an argument or abuse coming, have a plan to move to places in the home where you have an escape route and where the abuser does not have access to things to use as weapons. For example, you may need to avoid confrontations in the bathroom or bedroom (which can be traps with no exit) and the kitchen (knives and other potential weapons available).

PLAN FOR HEADING OFF POTENTIALLY VIOLENT SITUATIONS:

Domestic violence in a home often follows particular patterns, sometimes involving the use or abuse of alcoholic beverages or drugs. If you or the abuser uses alcohol or drugs, you can enhance your safety through planning. For example, you might try to arrange for alcohol or drugs to be used only in the presence of people whom you trust to intervene or call the police if your safety is at risk.

PREPARING FOR WHEN YOU HAVE TO LEAVE: Even if you are not planning to leave, you might have to leave quickly without much warning or opportunity to prepare, so take time now to prepare for the possibility. Make a list of things you may wish to take with you when you leave. Make sure you can get them if you need to leave in a hurry, either by identifying a safe place to put them, or by leaving them with a trusted friend or relative. Examples of what to take include:

- Identification
- Birth certificates for self and children
- Social security cards
- School and vaccination records
- Money (in most states, each party is entitled to half of a joint checking or savings account)
- Checkbook, ATM (Automatic Tellers Machine) card
- Credit cards
- Keys—house/car/office
- Driver's license and registration
- Medication
- Welfare identification, work permits, Green card
- Passport(s), divorce papers showing custody
- Medical records

- Lease/rental agreement, house deed, mortgage payment book
- Bank books, insurance papers
- Address book
- Clothes for yourself and children
- Pictures, jewelry
- Children's favorite toys and/or blankets

RESOURCES OUTSIDE THE HOME: You may feel very much alone, but you have resources outside the home. Here are some steps to take to help assure your safety outside the home:

- *People to Tell:* very victim of domestic violence or abuse should consider telling someone about the situation to help assure their safety. Your best source of advice is likely the local domestic violence hotline or agency, but there are other resources. Consider telling a trusted relative or friend and sharing your safety plan with them. If you have a neighbor you trust, ask that person to call the police if the person hears suspicious noises from the home. Develop a code word to use with trusted relatives or friends so they will know to call the police if you telephone with the abuser beside you listening to what you say.
- *Teach the Children* Teach your children how to use the telephone to contact the police and the fire department.
- *List of Safe Havens:* Develop a list of places to go if you have to leave your home. Have a back-up place in case your first choice is unavailable. Consider leaving copies of keys and important documents with trusted friends or relatives, as well as extra clothes for yourself and children.
- *Pay Phones:* Identify the locations of pay telephones near the home. Keep in mind that land line and cell phone telephone calls can be tracked through billing records and otherwise. Pay telephone calls are much more difficult to track.

SAFETY THROUGH AN ORDER OF PROTECTION: Every state has a procedure under which people at risk of domestic violence or abuse can obtain a court order keeping abusers away from them. Check with your local police department, court or battered women's shelter regarding the procedure in your area. If you obtain a court order of protection, keep a copy with you and consider informing your employer, neighbors and others in your vicinity of the order so that they can let you or the police know if they see the other party following you or near your home or workplace. Call the police if you believe the other party has violated the order. Make sure you understand what the order covers and when it expires. Most orders can be renewed upon a proper request, so find out from the court what the procedure is for renewing it if you need to do so.

SAFETY MEASURES FOR PROTECTION WITHIN THE HOME: After

separating, the victim may be at risk that the abuser will attempt to break into the home. Here are some steps to take to help protect against an intruder:

- Change the locks on doors and windows as soon as possible.
- Replace wooden doors with steel/metal doors.
- Install security systems including additional locks, window bars, poles to wedge against doors, an electronic system, etc.
- Install rope ladders to be used for escape from second floor windows.
- Install smoke detectors and purchase fire extinguishers.
- Install an outside lighting system that lights up when a person approaches the house.

SAFETY IN THE WORKPLACE: After a domestic violence victim separates from the abuser, there is a risk that the abuser will try to contact them at work or make trouble at the workplace:

- Inform your employer and the security staff in the building where you work of your situation.
- Give your employer the name of an emergency contact person if your employer is unable to reach you.
- Provide building security with a photograph of your harasser/abuser.
- Save threatening e-mail or voicemail messages.
- Have someone screen telephone calls you receive at work.
- Ask your supervisor for a parking space in a visible area close to your building and leave work with other people. Have security escort you to and from your vehicle if necessary.
- Have your paychecks sent to a location other than your home mailbox.
- Consider varying your routine in driving to and from work, including, if possible, your route. If you travel to and from work via public transit, make a plan of what to do if the other party confronts you, such as calling for help from the driver or operator or other passengers.
- Consider varying your routine regarding where and when you go shopping for groceries, and where and when you do your banking. Avoid using the same stores or banks you did when you and the other party were together.
- Speak to your supervisor about any changes the company can make to promote your safety and peace of mind.

SAFETY AND EMOTIONAL HEALTH: The struggle to achieve physical

protection against violence takes an enormous emotional toll, and you need to safeguard your emotional health as well as your physical safety. Your safety plan can include steps for you to take when feeling down or in emotionally challenging situations:

- What steps to take if you reach the point of considering a return to a potentially abusive situation.
- What steps to take to obtain support or protection when you have to communicate with the other party in person or by telephone.
- What steps to take when you are feeling weak or unable to stand up for yourself.
- What resources such as support groups are available to help bolster your defenses and help you through times of discouragement or depression.

Again, often the best starting point for advice on how to deal with all aspects of your situation is the local domestic violence project, shelter or similar agency for your area. If you don't know how to find them, call the National Domestic Violence Hotline at 1-800-799-SAFE (7233) or 1-800-787-3224 (TTY) for a referral to your local agency.

When One Party Wants to Separate and the Other Does Not

All things being equal, it is easier to separate when both spouses and partners agree that their relationship should end, or at least should be on hold during a separation. When they do not agree on that basic question, it is common for the party opposed to separation to refuse to negotiate, or even discuss, a separation. Similarly the party who wants to separate may feel forced into unilateral action that does so much damage to the relationship that what might have been a friendly temporary separation becomes a nasty permanent one.

If you are the party who wants to separate, remember that the world is not only full of people who regret that they pushed for a divorce, but also full of people who think divorcing was the best decision they ever made. Which group will you wind up in? Here are a few questions to help you decide what to do:

- Can you afford for one household to become two?
- Five years from now, will you be better off or not if you separate?
- Have you done what you should to work things out?
- Will the separation leave your children or others you care about better off, or not?
- Are you in a relationship that is safe or unsafe for you or your

children?

Take our quiz at the end of Chapter 1 (*Assessing Your Situation*) to help you decide what to do.

If you are the party who does not want to separate, our experience is that reconciliation is most likely when the parties show respect for each other and each other's concerns. Some marriage counselors will tell you that, if you want to reconcile, the best way to bring about reconciliation is to give the other party freedom to make their own decisions, at least temporarily, even if it means a separation. Separation is almost by definition temporary in the sense that the parties can always reconcile; only a divorce is final in the sense that it terminates the marriage. Sometimes the party who wants to separate just needs and wants space in which to be her or his own person, or time to think, or to get something out of their system, or to get over something the other party has done. Letting someone go to do those things can be the best hope that she or he will come back someday.

You may be tempted to take unilateral action to punish the other party for wanting to separate, but your best strategy is to be open to negotiation. Find out what the other party wants and consider agreeing to it if it seems fair. The chances of reconciliation are much greater if you keep the door open by being reasonable and understanding. If you slam the door through unilateral action taken out of anger or bitterness or hurt, the other party is much less likely ever to come back.

When You Have Children Together

In the course of separating, parents often act unilaterally, without consulting with the other parent, when it comes to the children. One parent refuses to allow the other parent to see the children, or imposes severe restrictions on the other parent's contact with the children. Sometimes these steps are justified, as when one parent has committed domestic violence, or has a serious mental or physical illness or addiction that renders the parent incapable of good parenting, or has been abusive or neglectful toward the children. Sometimes these steps are not justified, as when one parent denies the other parent access to the children out of sheer anger or spite and without good reason. The test of whether a parent's actions regarding children are justified is whether the actions are in the *best interests* of the children.

Courts around the country use the test of *best interests* in making

decisions about children, and parents are always expected to act in their children's best interests. Therefore, if you are a parent considering the step of cutting off or limiting the children's contact with the other parent, be sure that you are acting in the children's best interests. If you are not sure, think again. Courts generally expect each parent to support the children's relationship with the other parent as long as that relationship is in the children's best interests. You may pay dearly, perhaps losing parental rights yourself, if the court sees you as attempting to undermine or sabotage the children's relationship with the other parent. So, if you are considering taking unilateral action to limit or cut off the other parent's relationship with the children, *you had better be ready to justify what you do with solid evidence.*

Another reason to proceed with caution when it comes to depriving the other parent of access to the children is that there is no surer way to poison the chances of a friendly separation and divorce than taking the children away from the other parent. Except in clear-cut cases of abuse or domestic violence, taking access away from the other parent is almost certainly laying the groundwork for an expensive and destructive court battle.

On the other hand, if you do have strong grounds in the children's best interest for limiting or cutting off the other parent's contact with the children, you should do so. In fact, in extreme cases you could be faulted by the court if you do not take steps to protect the children against the other parent.

This framework helps guide the decision as to what separation strategy to pursue when it comes to children.

If it is in the children's best interests to have a strong and active relationship with both parents, then it is likely also in their best interests for you and the other parent to adopt a *negotiated separation* strategy, rather than acting unilaterally. The negotiated approach will enable you and the other parent to develop a schedule for the children that ensures they spend significant time with both parents and can still concentrate on school and activities.

If it is in the children's best interests to have limited or no contact with the other parent, you may have to pursue unilateral action to limit or cut off the other parent's contact. However, if the other parent acknowledges that, at least for the time being, their contact with the children should be limited or terminated, you may be able to negotiate the terms for those limitations.

If it is in the children's interest to have limited or no contact with you, you likely will enhance your chances for restoring your relationship with them by agreeing to limit your contact with them now. As hard as that will be, it shows that you can identify what is best for your children and put their needs ahead of your own.

The Legal Dimensions of Separation

This section addresses the legal aspects of separating. There are two legal questions that anyone involved in a separation should consider:

- Should there be a separation agreement and what should it cover?
- Should there be a court action and what should it cover?

These are separate and independent questions. There can be a separation agreement and no court case, or there can be a court case without a separation agreement, or there can be neither, or there can be both. Within each of those questions are sub-questions, such as: If there is a separation agreement, does it need to be in writing? And, if there is a court case filed, should it be a divorce case or some other kind of case?

The level of legal formality involved in a separation can range from none to extreme:

- A separation with no legal formalities might involve one party moving out, taking what clothes, furniture and other property the other party is willing to part with, on the general understanding that each party will pay their own bills. There is nothing in writing and no court case. Some married people have been separated for years, without being divorced, on simple terms like that. People who have never been married, who own no real estate together, and who have no children together can separate without any written agreement or court case.
- At the other extreme, the parties might be separated pursuant to the terms of a 30-page settlement agreement, drafted by lawyers, signed by the parties, and filed with the court in the divorce case or judicial separation case that one or both of the parties has started.

Separation Agreements

Most separations involve an agreement on at least something. An agreement that the husband will take his clothes and his car with him when he moves out is an agreement, even if it is not in writing and

even if it does not cover most of the areas that come up in separation. If you and your spouse or partner can come up with an agreement on the terms of separation, the effort is likely worth making. As the previous section of this chapter illustrates, however, there are situations in which trying to reach any kind of separation agreement may be inappropriate, even dangerous, or a waste of time.

Separation agreements are usually seen in cases where the parties have been married and decide to separate. However, there is no reason why people who have not been married cannot benefit from a separation agreement in the same way as people who are married. In both situations, a separation agreement can enable two people to part ways physically, emotionally and financially in an orderly and fair fashion, as opposed to a chaotic and unfair fashion.

If you and your partner decide to work out a separation agreement, we suggest that you consider hiring a mediator together to provide you both with neutral guidance throughout the process. Unlike a lawyer, a mediator does not represent either or both parties. Instead, the mediator facilitates the process of coming to an agreement. [9]

If you and the other party will definitely not be able to work out an agreement on much of anything, an alternative is to hire a lawyer to represent your interests, if you can afford it. A lawyer can help make sure that an agreement, if reached, covers everything it should, and that it will hold up as a valid contract. Ideally both you and your partner will have an attorney. Keep in mind that the same lawyer cannot represent both of you. If you and your partner cannot each afford a lawyer, you can hire a lawyer to represent one of you and draft an agreement, but the other should buy an hour of another lawyer's time to go over the agreement.

If you are working toward an agreement, with or without the help of a mediator or a lawyer, here are some more suggestions:

- *Start with the easy parts.* If you and your partner begin with the areas you are likely to agree upon, you will have an agreement on at least something, and you will be building a foundation of goodwill upon which to negotiate the harder parts.
- *Identify all of the issues that matter to you up front and make sure your partner does the same for all issues that matter to your partner.* If one party raises a new issue during negotiations, especially toward the end of negotiations, the other party often becomes frustrated and suspects bad faith. At a minimum, the injection of a new issue into ongoing

negotiations will set back the negotiations, perhaps to the beginning, as the other party adjusts to the new issue. Avoid all this by putting all issues on the table at the outset.

- *Don't insist on having your way on everything.* Good agreements involve give and take. For you to get your way on what matters most to you, you may need to give up your way on what matters most to your partner. If you both value the same things most highly, you may need to share.
- *Work from a checklist.* Use a checklist to make sure your agreement covers what it needs to. See our checklist in the sidebar, or find another one on-line, or make up your own.
- *Be wary of using preprinted forms.* Unless you understand them completely, pre-printed “generic” forms may hurt more than help. Sometimes problems arise when people use forms obtained on-line or from a book without understanding what parts of the form mean. If you and your partner are representing yourselves, it is often better to put the agreement in your own words rather than using legal language that may not reflect what you mean.

Three Reasons to Put Your Separation Agreement in Writing

- The agreement defines everyone's rights and responsibilities and can be used to resolve disagreements if memories differ as to what was discussed and agreed upon.
- Parties sometimes think they have reached an agreement through discussion when in reality they are each hearing what they want to hear and do not have an agreement. Putting the agreement in writing helps assure there truly is an agreement.
- The process of writing out an agreement can help parties make sure they have covered everything they need to.

Separation Agreement Checklist

Here are the major topics often covered in separation agreements. *Note that this list does not include some topics covered in final settlement agreements and divorce judgments. Use our checklist for mediation and settlement agreements for that purpose.* [\[10\]](#)

- For starters, the names and addresses of the adults, and the names and dates of birth of the children.
- What period of time the settlement agreement is intended to cover. Some settlement agreements contain no expiration date.

- If there are children, how decision-making regarding the children's schooling, health care and other major decisions will be made. Usually parents share the decision-making, but sometimes the authority to make decisions is assigned to one parent. Shared decision-making usually means both parents have full access to all medical and educational information regarding the children, and share the authority to make decisions in those and other areas.

- If there are children, where the children will reside and attend school, and which days and times the children will be with each parent. How specific the schedule should be regarding each parent's visitation depends on whether you and the other parent are likely to be able to agree. If you are very sure that the schedule will be worked out by agreement week to week, it is fine to be flexible. If you are not sure, the agreement should be very specific in terms of the exact days and times the children will have with each parent, and should be clear on which parent will provide transportation at which times. Make sure the times set aside are convenient for the children as well as the adults.

- If there are children, how much child support is to be paid, how often it will be paid, and the way it will be paid (by check, by payroll deduction, etc.). If you aren't sure what child support should be paid, check with the courts in your state to find out what arrangements apply to your and your partner's financial situation.

- If there are children, how will any child care expenses be paid? How will expenses associated with summer camps, sports and other activities be paid?

- Who will carry health insurance for the family, or at least for the children, and what contribution each partner will make toward the total cost?

- Whether either party will be receiving alimony (also known as spousal support) from the other, and if so, how much, how often, and how it will be paid. Alimony is generally deductible by the payor if it is paid under a court order or a written agreement, so your settlement agreement should be in writing if the party paying alimony wants to deduct it at tax time.

- Which party will live in the home, often referred to as "the marital residence," and which party will be paying the mortgage, utilities, taxes, insurance, maintenance costs and other expenses associated with the home? It is common for these expenses to be the

responsibility of the party occupying the home, but often the other party covers some or all of them, either by paying directly or through alimony. In other cases, particular expenses are assigned to each party. It is also not unusual for the agreement to state which party is entitled to the deduction for mortgage interest.

- Which party will have the use of any vehicles owned by either or both parties, and how any loans and other expenses for the vehicle will be paid? It is common for whichever party has the use of a vehicle to be responsible for paying the loan and other expenses for the vehicle, but it is also common for the other party to contribute if that party has the ability to do so.
- Which party will be responsible for which other debts and expenses, such as credit card bills? This is particularly important if the bills are in both parties' names. It is quite common for a party to be responsible for bills and loans in that party's name alone.
- If either or both parties are entitled to a tax refund, particularly if the parties have filed jointly and are entitled to a joint tax refund, who will the refund be paid to?
- If there are children, which party will take the tax deduction for the children if you file separately?
- How property will be divided? Often the parties defer dividing property until the divorce case, but nothing says they cannot agree to divide property in a separation agreement, especially bank accounts or other financial assets that one or both parties may need to live while they try to work out a final settlement.

Court Cases

Most, if not all, states allow people who have been married and want to separate to file separation actions in court if they are not ready to file a divorce case. The main purpose of filing a separation action is to obtain a court order that establishes the terms of the separation, either by agreement of the parties or by court order after a hearing.

However, separation actions are much less common than divorce cases. There are likely two reasons for this. First, it is somewhat unusual for married people to separate unless one or both of them has decided to seek a divorce. Second, people who separate without wanting to divorce often are able to reach agreement on the terms of separation and feel no need to file a court case.

There are other reasons, however, why a court action for separation can be helpful. A court order establishing alimony helps assure that the payor will be entitled to the tax deduction. A court order covering children in terms of residence, schooling, visitation and other things can help avoid disagreement later.

Again, if you possibly can, obtain the advice of a lawyer on whether there should be a separation case filed. As long as there is a written separation agreement, and as long as both parties are following it, there may be no need for any court case unless and until you and the other party are ready to begin one.

Keep in mind that different states have differing requirements regarding separation agreements. For example, in New York, to get an uncontested divorce you must document and sign the separation agreement, file it with the local family court and wait six months. After the waiting period, the court can grant the divorce based on the agreement filed, without any court hearing. In our state of Maine, there is no requirement of a written agreement, but if the parties enter into a written agreement, it has to be signed before a notary public or lawyer to be binding. Check your state's particular requirements before proceeding.

Chapter 3

Finances, Property and Support

“They (the clients) always say it’s not about the money, it’s about what’s best for my kids; ...but it’s always about the money.”

— Anonymous Experienced Trial Lawyer

The Usual Economic Catastrophe of Separation and Divorce

As we have previously noted in Chapter 1 (*Assessing Your Situation*) one of our colleagues has calculated that on average the cost of maintaining two households after separation is at least 170% of the cost of maintaining the pre-separation household at the same standard of living. In our society, few people put enough money in the bank every month to cover that extra 70%. Unless you are fortunate enough to be in one of those households, or unless there are significant and relatively liquid funds available to you either from the relationship’s joint assets or from other sources, it is almost inevitable that a separation or divorce will cause both you and your partner significant financial hardship in the short and medium terms.

This chapter will provide more detail about the differences between short term financial considerations and long term ones, how judges distinguish between the two, and how judges make decisions about finances.

We discuss assessing your finances in Chapter 1 and have included worksheets in Appendix A to help you with this. Worksheets 1 and 2 help you to add up all of the assets and debts in your household. Worksheet 3 summarizes your net worth. Worksheet 4 helps you to construct your best estimate of your current joint household budget. Worksheets 5 through 8 help you to construct budgets for two households, each to be maintained by you and your partner after a separation. These worksheets will require you to make estimates of future costs. [\[11\]](#)

If you skipped filling out these worksheets as you read Chapter 1, or if you filled them out before your court case, and you now have a case pending, it is absolutely, positively, important that you complete them now, or update them with the most current information!

As you review this chapter, please keep three things in mind. Every

state's divorce laws are different, and can lead to very different results. Every judge is different, and what one judge may see as a reasonable expense, another judge may see as a luxury. Every case is different. We can make general observations, but neither we nor anyone else can or will guarantee that a judge will apply these general rules to the facts of your case.

Once again, it is not only important that you realistically assess what your financial situation is or will be, but also that you assess as realistically as possible what your partner's situation will be. If you expect your partner to provide some or all of your support after your separation or divorce on either a temporary or permanent basis, and if your partner is unable or unwilling to do so, you have a problem.

The Short Term: Protecting Yourself Against the Initial Impact of Separation and Divorce

In the early stages of a contested divorce case, the judge will be most focused on keeping the ship afloat. In other words, the judge will look for a temporary fix to immediate problems even if it is not what will work long term, rather than a long-term solution that is most fair to the parties. A judge may order one party to pay some of the other party's expenses via a "motion for a temporary order" or an "interim hearing" or some other procedure more commonly used in your state.

So, a payor party may well be told to pay more over the short term than he or she could be ordered to pay as part of a long term decision, because the extra payment is essential to keep the home mortgage from going into default. On the other hand, the payee party may receive much less in a short term order than he or she will receive in a permanent resolution, if the other party is paying joint or unavoidable obligations that can be reduced or eliminated in the longer term.

Judges will often look primarily at cash flow in coming up with a temporary order, and will usually defer deciding longer term questions such as economic misconduct or unfulfilled earning capacity. Those kinds of issues become far more important in looking at long term financial obligations.

Judges also will seek to avoid "economic waste." For example, judges and lawyers know that if the family residence will ultimately need to be sold, it will bring far more if it is sold in the ordinary course of a real estate transaction than if it has to be sold in a hurry for a fire sale price, or worse, if the bank sells the house in a foreclosure proceeding.

You can do a number of things that will help to insulate you from the worst kinds of immediate problems. First of all, and most importantly, if you and your partner can come up with a temporary financial plan as part of the process of negotiating a separation that we describe in Chapter 2, that's the best thing you can do.

If that is impossible, for whatever reason, there are things you can do on your own. Remember, cash flow is the key at this time, so you want to maximize current cash flow, without doing things that will have a terribly negative effect over the long run.

Here are some of the things you can do:

Eliminate or reduce unnecessary expenditures to improve cash flow.

Review your monthly budget. Ask yourself: "If I had to survive on 50% of this what would I have to cut?" or, to look at it another way, "If I had to survive just on my own net income, how would I do it?"

Evaluate what are the absolute minimum expenses to maintain your household: rent or mortgage payment, unavoidable taxes, heat and other essential utilities, food.

Construct a reduced budget, looking at things such as telephone (Do I need both a land line and a cell phone?); cable TV (Can I just use an antenna; if not, does the cable TV provider offer a "basic" service package?); clothing (Do I absolutely need to purchase any additional clothing, or can I use what I have?); and anything else that has monthly fees (Do I have to go to a gym, or can I work out at home?).

Evaluate just making minimum payments on your credit card debt during this period. (Admittedly, this is a very bad idea for the long run.) However, it is important to make the minimum payments, because if you don't, the credit card company will likely impose late fees and other service charges, and may also dramatically increase the applicable interest rate.

If, after this analysis, you find that your unavoidable expenditures exceed your income, you may be able to approach your creditors and ask to make short-term alternative plans. For example, the bank may agree to accept interest-only payments on your mortgage or on a vehicle loan; you may be able to drop certain more expensive insurance coverages, such as collision insurance; or you may be able to reduce your premium by increasing your deductibles.

Don't consider this a time to celebrate!

Many people relish their new found sense of freedom just after a separation, especially if they have been unhappy in their relationship for some time. This can lead to a desire to splurge, and give yourself some of the luxuries you feel you have been denied. This is absolutely a bad idea and an even worse one if it negatively impacts those who depend on you. You should avoid taking on any new obligations, such as a new car or a larger condominium.

There is little that will make a worse impression on a judge than a parent who claims inability to pay child support while taking a Caribbean vacation with her or his new romantic interest, or a spouse who decides this is the perfect time to buy a new large screen TV, or a pearl necklace, while leaving their partner holding the bag for the mortgage or payment of marital debts.

Preserve assets.

One of the most common questions is what you should do about assets that are held in both names. Again, the best answer is to work out a separation plan ahead of time; but, we recognize this is not often done. Many states, including ours, have statutes that prohibit selling, transferring or concealing assets once a family law case is filed. These statutes create automatic “preliminary injunctions,” that is, temporary court orders forbidding these kinds of transactions, except in the ordinary course of maintaining a household or business. Whether or not your state has such a law, this is a bad idea. These kind of actions usually are discovered before the case is done, and you may wind up convincing the judge that you were acting in bad faith, or are not to be trusted, or both. This is not a position you want to find yourself in at trial.

Diminishing Assets

I’m very interested in sports-racing cars from the 60’s, although I don’t own one. I do monitor some internet forums that are used by people who do own these cars (or who wish they did) to exchange information.

On one of the forums I check, a guy posted a message about how he was about to go through a divorce, and was pretty sure he would lose his vintage sports car. A message came back that suggested he do what another forum participant had done in a similar situation; that is, sell the engine to a fellow enthusiast for scrap value, the transmission to a second, the body to a third, and the chassis to a fourth. Then wait until the divorce is over and buy them all back and reassemble the car!

I don’t know how this came out. We have seen similar cute

maneuvers in cases before us. *This is a high-risk strategy!* You might get away with it, especially if your partner doesn't have a good sense of what your assets are. However, if you try this and you get caught, the negative consequences will almost certainly exceed whatever you might have gained, maybe by a factor of 3, or 10, or more.

— J.D.K.

Each account holder of a joint account has the right to withdraw the entire account. We advise that you not automatically exercise this right—just because you can does not mean you should! However, if you think your spouse or partner might drain an account, it would be foolish for you to let it happen. So, while there is no perfect answer, our suggestion is that, in the absence of a planned separation, you withdraw 50% of any assets in a jointly held account, and deposit those assets in an account only in your name. Then, notify the other account holder that you have done so, and say that you expect that he or she will do the same with the other 50%. Your partner may react with shock, dismay or anger anyway. However, taking the middle way should protect you from later allegations that you have looted all of the marital assets, while also protecting yourself from wholesale looting.

If you are lucky enough to have separate assets held only in your name, you should safeguard these; they may be very necessary to cover shortfalls in a budget that is stripped to its essentials, and should not be squandered for non-essential purchases. If there is any question in your mind that your bank or another third party may think these are joint assets, confirm with those third parties that only you are entitled to have access to these assets.

Temporary Financial Arrangements Before the Divorce Hearing

It is true almost everywhere that court systems are overloaded with family law cases. As a result, it may take a long time, or might even be impossible, to get a court order dealing with finances prior to a final hearing. More commonly, it is possible to get a hearing in a relatively short time to have a judge allocate temporary responsibilities for assets and debts while the case moves along to a final hearing.

You are probably sick of hearing this refrain by now, but once again, if you and your spouse or partner can reach an agreement you will be better off, and are likely to achieve a more nuanced result than if a judge has to make these kinds of decisions for you. However, if no agreement is possible, you should request an “interim hearing” or a “temporary order” or the like.

If a court enters a temporary order, it will usually allocate exclusive possession of the marital residence to one party and allocate the costs of maintaining the residence. If there are children, the order may also contain provisions setting up temporary custody, visitation and child support. If there is a big income disparity between the parties, a temporary alimony award may also be included.

Temporary Decisions versus Longer—Term Decisions

A divorce case can involve three or four different kinds of financial decisions by the judge. The first kind, which we will call “temporary needs decisions” has already been discussed. As we noted, the objective is to keep the ship afloat, so a temporary order may be very different in amount or kind than a permanent order, and overall long-term fairness is less of a consideration.

The second kind involves what we call “transitional financial decisions.” Transitional decisions are ones that will be put in place for a limited period of time—usually no more than a year or so—and often to cover one-time costs associated with a divorce, such as costs for moving, or security deposits for a new residence, or education to enable a spouse to re-enter the work force. One spouse may be required to pay alimony temporarily to cover these transitions.

The third kind of decision involves “long-term financial decisions.” This is where the judge focuses on fairness over the long term. To achieve fairness, the judge may order one party to pay alimony to the other for years or decades. Because alimony requires the parties to maintain contact at least financially, and that connection can prolong conflict and keep both parties from moving on, judges sometimes award one party a much greater than equal share of marital funds and property in lieu of alimony.

The fourth type of decision involves the parties’ post-retirement years. These decisions typically entail dividing up pensions or other sources of retirement income. If the parties are younger and have most of their working lives ahead, the judge may not deem it necessary to address the retirement phase. If the parties are nearer retirement, long-term fairness may make it essential to address the retirement phase of life.

How Judges Allocate Assets and Debts to Each Party

Financial assets include both “tangible” and “intangible” assets. Tangible assets are things that you can see and touch. Intangible assets are assets that have value but that exist in ways where the asset is

held, but cannot physically be touched.

Examples of tangible assets include “real property,” which means real estate and items that are permanently attached to real estate, such as homes, barns, condominiums and the like. Title to “real property” is usually pretty easy to determine, as it is usually recorded in a registry of deeds, or is listed on municipal tax records or the like. Values are often reflected by local tax valuations or may be shown by an “opinion of value” or a more formal “real estate appraisal.”

Tangible assets also include “items of personalty” or “personal property,” such as vehicles, clothing, furniture, pets, art, jewelry, tools and the like. Some tangible assets have titles and values that are easy to determine. For example, your car or truck has a “certificate of title” issued by your state that identifies both the legal owners and any lienholders, such as your bank. Used vehicle values can be pretty easily discovered by such publicly available sources such as the NADA Price Guide, or Kelly Blue Book, Edmunds, or other books or websites.

Personal property also includes all of the day-to-day items you and your household use in your daily lives. While many of these items have great emotional or symbolic importance to the parties, judges know that they generally are valued at their “yard sale value” which is most often a small percentage of the original purchase price. An important thing to consider is that judges usually do not have much patience for disputes over that one old record album or book, or the recliner or tool collection that has so much value to one party, or the cookbooks and the sofa that are so important to the other. We know of cases where the lawyers have agreed to secure a duplicate of that one item of relatively little value that is holding up a settlement, sometimes at the lawyers’ own expense!

Remember the Tupperware

A judge who used to sit in our court was hearing a divorce case in which the parties wasted a great deal of court time arguing over a number of relatively valueless items, including their Tupperware collection. The judge became so frustrated, he entered a final order giving one party the tops of the Tupperware, and the other the bottoms.

The moral is that you do not want to be seen as wasting the court’s time over trivial issues.

— J.D.K.

Intangible assets are assets that cannot be physically seen or touched but that are represented by symbols or symbolic documents, such as

bank accounts, stocks, bonds, or leases. Intangible assets have value, and are often at least as valuable as tangible assets, if not more so. They can be very easy to value, or frustratingly difficult to attach an accurate value to. If it is hard to attach a value to a particular item, such as a 1/3 interest in a partnership or closely held corporation, the judge will often require an “expert witness” to testify as to the asset’s value.

Retirement assets include pensions, 401(k) accounts, 403(b) accounts or other tax deferred employment benefits, retirement savings accounts such as IRAs, and anticipated social security benefits. Judges treat these kind of assets very differently, and generally regard them as divisible, but not currently available to either party. There are very adverse tax consequences if assets are prematurely withdrawn from these kinds of accounts. Given their special nature, courts will attempt to avoid those adverse tax consequences, and will try to avoid ordering that the assets be “cashed out” as part of the parties’ divorce.

How Judges Divide Tangible Assets

Judges will try to accomplish a number of goals in making property allocation decisions.

A judge’s first step is to remove any “non-marital” property from the equation, and award it to whichever spouse owns it. While every state’s laws vary somewhat, examples of “non-marital property” include property that one spouse owned before the marriage that has never been put into joint ownership. (This may not be true in “Community Property” states.) Inheritances that come exclusively to one party are also generally non-marital property, as are gifts given from one spouse to the other, or that are given to one spouse from a third party.

Community Property States

There are nine states that are known as “community property” states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. While the laws are different in each of these states, there is more of a presumption in a community property state that the court will divide all property held by either party in the marriage equally, as opposed to the more flexible “equitable distribution” laws in other states.

Next, the judge will try to make sure each party’s basic needs for tangible property are met. Judges try to make decisions that allow each party to have a reasonable starting point for their new life

situation once the divorce has been finalized. So, for example, if a couple has two beds, or two sofas, or two toasters, it is unrealistic for either party to expect that the judge will allocate both of the items in question to that party, and leave the other with nothing. If, for some unusual reason, a judge is convinced to do so, there will usually be some other offsetting allocation made elsewhere in the decision.

Once basic needs are met, other considerations can come into play. For example, let's assume the net value of a piece of real estate is \$200,000, and one party's parents gave the couple \$40,000 for the down payment, even though the entire net value is now legally "marital property." The judge may decide to credit the parents' contribution to the child of the parents by allocating all of the down payment to that party and then dividing the balance equally. So, in this example, the party whose parents funded the down payment would be allocated \$120,000, and the other party \$80,000 of the asset's value. As the Supreme Court in our state has observed, "A just division of property is not necessarily an equal division of property."

Personal Property

Next, the judge will very likely allocate any agreed-to items as the parties have decided. If there is no agreement, and the item is one of a kind or is not a basic need item, the judge may make very unequal allocations of some items of property, but attempt to adjust for that elsewhere. For example, if Susan loves to fish and Mike loves to cook, the judge will likely give Susan all or most of the fly-fishing gear; and Mike all or most of the high-end pots and fancy cookbooks.

Judges will also very likely give a party all of that party's very personal possessions such as clothing or jewelry, without making an offsetting allocation to the other party somewhere else, especially if these items do not have unusually high values. Of course, if the parties jointly owned a piece of diamond jewelry worth \$100,000, the judge would likely award it to one party only by making an offsetting adjustment elsewhere in favor of the other party.

Be Careful What You Wish For

It is common, if not typical, for parties in divorce cases to play value games with the jointly owned personal property and sometimes even the real estate. Specifically, one party will put a low value on the items she or he wants, but a high value on the items the other party wants. The reason, of course, is that the parties expect the judge will divide jointly owned property more or less equally, so each party has a powerful motive to minimize the value of property they want or

expect to be awarded.

In one case, the husband put a very low value on his worn-out automotive tools but a very high value on the wife's rare Hummel figurine collection. The wife, however, said her chipped and unpopular figurines were worth little, but those antique car tools... In announcing my ruling, I said I believed in awarding parties what they value. Since the husband valued the figurines more than the tools and vice-versa for the wife, he got the figurines, valued at about what he said they were worth, and she got the tools, valued at about what she said they were worth. (My ruling also said the parties were free to swap the items they had been awarded, and one of their lawyers told me later that they promptly did just that).

The moral of the story: Be realistic and be careful what you wish for.
— A.M.H.

If there are two vehicles, a judge will likely allocate one to each party, in accordance with the historical use pattern. Some judges take any difference in net value between the vehicles into account and make adjustments, others do not. If there is a loan on a vehicle, the party that is awarded a vehicle can expect to also be allocated the sole responsibility to pay the associated debt. This rule generally applies to any type or item of property that is secured by a loan.

Judges will also allocate an item to one party if that party has a clearly superior claim to it for sentimental or family reasons. This will usually result in an adjustment elsewhere to compensate.

Finally, there are some items that are simply not replaceable, and that have great emotional value but little monetary value. The most common example is family pictures. It is our usual practice to divide these equally, but to allow the party that does not receive one or more pictures (or other duplicable items) to have copies made of any items allocated to the second party, but at the first party's expense.

Real Property

Deciding how to value and divide interests in real property is often far more complex than the division of items of personal property or intangible assets. Very often, a couple's home is their largest financial asset, in addition to being their home, which usually brings significant emotional attachments to the fore. While there is a liquid market for other financial assets, such as stocks and bonds, that is because these assets are interchangeable—a buyer does not want your particular shares of Ford stock, or my particular shares of Apple stock, but anyone's shares in these companies.

Of course this is not so when it comes to real property. We know, and courts have long recognized, that every piece of real property is unique. That means that a particular house may have a far greater value to one particular purchaser than another, for reasons that can be directly related to the property, such as its attractiveness or location in a certain school district. Alternatively, the perceived value can be based on factors unrelated to the property itself, as the buyer's need to close a transaction by a certain date for tax purposes, or because it is located close to (or perhaps far away from) the buyer's family.

While the parties will have their own opinions as to the value or their property, and while a more precise prediction of a likely selling price may be established by an opinion of value from a realtor, or even better, by an appraisal from a certified real estate appraiser, all of these opinions are just predictions of value. The actual value can only be truly shown if the property is sold in an arm's length transaction.

When there is a serious dispute or doubt about the value of property, the judge may be more reluctant to allocate the property based on opinions and appraisals, and more likely to order the property sold and the net proceeds divided. Another reason judges often order the marital home sold is that the parties' equity in the home cannot be shared fairly between the parties unless the house is sold.

However, there are many reasons that a judge may decline to order the sale of a marital home unless both parties agree. Such reasons include: high transaction costs to the parties of a sale (a 5 or 6% commission to the real estate agent being the most common); capital gains or other tax consequences; bad timing of a sale in a "down" market; or the likelihood that a sale would only pay off debt and not put any equity in the hands of the parties.

Another reason a judge may award the marital home to a party instead of ordering it sold is based on the ages of the parties' children and the disruption that a home sale would cause to the children. Often, a judge may allocate the possession of the home to a parent who is allocated primary residence of the children, and delay a sale until after the child has completed her or his attendance at a local school.

Still another reason a judge may decide not to order a sale, at least temporarily, is if one party can occupy the home and make all loan and tax payments more cheaply than renting.

This can be a complicated area of law. If you think that the value of

the house will be contested, you should anticipate having to hire a real estate appraiser as an expert witness to provide the court with a reliable estimate of value. Parties or lawyers can often save money by agreeing to hire one appraiser as a “joint expert.” However, parties should realize that a joint expert’s opinion is very likely to be accepted by the trial judge as the best estimate of value, even if one party later strongly disagrees with it.

How Judges Divide Money and Other Intangible Assets

Judges are far more likely to treat money or monetary equivalents, (such as stocks or bonds) as simply divisible by halves, without regard to the original source or the current form of those assets. In general, each party should expect to receive one-half of any marital assets held in this form, after adjustment for any other unequal allocations.

Judges will often allocate all of one item of property to one party, and all of another of equal value to the other, recognizing that dividing up 100 shares of stocks into two parcels of 50 may incur unnecessarily high transaction costs, or adverse tax consequences, both of which most judges would seek to avoid.

While intangible assets are usually divided on a 50/50 basis, there are two important exceptions to this rule. First, if the money or account is marital property, but all or some of it was derived from a non-marital source, the judge may decide that equitable considerations dictate an unequal allocation, similar to the division we outlined above in discussing a piece of real estate where a portion of the down payment was contributed by one party’s family.

The other exception is for relatively small checking or savings accounts used by either party for ordinary monthly cash-flow needs, whether or not titled in one party’s name, or in both parties’ names. Judges will usually allocate these accounts so that each party can conduct their post-separation financial affairs without interference from the other party.

How Judges Assign Responsibility for Debts

Judges often consider debts to be “separate,” “separate but marital,” or “joint,” whether or not your state’s laws make any distinction between these types.

Examples of “separate” debt are: an account held in only one party’s name; debt incurred prior to the marriage, and debt clearly related to an item that either did not benefit either party, or an item that is

being allocated to one party. Other examples of separate debt are pre-existing student loans, a car payment related to a vehicle that is being allocated to one party, or a credit card used by the wife to buy only jewelry for herself, or a credit card used by the husband to buy only tools for himself. Separate debt will almost always be allocated as the sole responsibility of the party whose name is on the debt.

“Separate but marital” debt is where only one party’s name is on the account, but both parties benefited from the debt. An example of this might be a VISA account used for family vacations, but held only in the wife’s name. A court does not have the authority to add the husband as a co-debtor, but may recognize that the husband shared in the benefits, and should now be responsible for a portion of the obligation. The court may allocate all of this debt to the wife for ease of administration, and then make an allocation to the husband (equal to 50% of the cost) of another asset or debt in order to compensate for this allocation. Alternatively, the court might order each party to pay 50% of the monthly cost, and require the husband to “indemnify and hold harmless” the wife if he doesn’t pay his share. Unfortunately, if the husband doesn’t pay, the wife would need to return to court to enforce this provision, so this is a less favored option.

“Joint debt” is debt that was incurred in both parties’ names. Each party is “jointly and severally liable” to the creditor, which means that if only one party has assets available to satisfy the debt, the creditor may choose to try to have that person ordered by a court to pay the whole debt.

Parties sometimes think that judges can remove their names from debts that were generated from a credit card or loan titled in both parties’ names. This is not correct; the creditor is not a party to the family law proceeding, and the court cannot order the creditor to do anything. While a judge may order one party to refinance a debt so as to remove the other party from any responsibility for repayment, this is often not possible, especially if the debt is not secured by an asset of greater value than the debt.

All debt of any kind is also “secured” or “unsecured.” “Secured debt” is a loan that is secured by something of value that is called “collateral.” The most common example of this is a vehicle that was purchased by a trade-in or down payment, with the balance financed through a note that has a specified monthly payment, and that ends on a fixed date. Secured debt is most commonly allocated by assigning the debt to the party that is allocated the collateral, so that “the debt follows the property.” The court can also handle the debt by ordering

the collateral sold and the proceeds distributed between the parties. A typical revolving credit card account, which is not tied to any particular item, is “unsecured debt.” Whether debt is secured or unsecured can make a big difference, especially if there is a bankruptcy.

Too Much Debt: Bankruptcy 101

Most modern American households carry a great deal of unsecured debt, usually in the form of credit card debt or personal loans.

It is not uncommon for households at any point on the income scale, from working class families with no resources, to families with six figure incomes, to carry unsecured debt equal to 10% or more of their combined annual incomes. At that level it becomes hard to make monthly payments at a level that will pay off the debt in a reasonable time, and even a few missed or late payments can lead to significant fees, or a large increase in the interest rate, or both. Once that happens, the debts begin to spiral upwards, and people begin to incur additional debt just to make the increased monthly payments.

If the parties’ combined unsecured loans and consumer credit debt (not including a mortgage on a home, a home equity line, or a vehicle loan) exceed 25% of their combined gross annual income, the parties will likely have to file for bankruptcy either during the divorce, or within a few years afterward.

We have seen cases in which the unsecured-debt-to-combined-income ratio has been as high as 180%. At this point, bankruptcy is unavoidable. While it is now harder to have the “slate wiped clean” in bankruptcy, it is still possible to do so, or if not, to file a “wage-earner” type of bankruptcy, which can result in a reduction of the total amount to be paid. A bankruptcy filing, either during or after the divorce, will significantly complicate the parties’ lives. This sidebar summarizes some of the more important provisions of the bankruptcy laws as they relate to family cases, but this is a complex topic, and consulting a lawyer who knows about bankruptcy is a very good idea. However, if it appears that one or both parties may have to file bankruptcy, it is important that both parties understand the ramifications. It may be best for the parties to file jointly, or at least to do so in a cooperative way, in order to maximize their exempt property. There is an important pitfall—if each spouse is ordered to pay 50% of joint debts, and one spouse files bankruptcy and successfully completes the process, that party obtains a “discharge” which may well relieve him or her of that obligation. If so, if the other spouse has not also filed, the non-filing spouse may become 100% liable for all of the debts assigned to both parties. This is because the filing spouse’s liabilities are eliminated, but joint account

holders are ordinarily “joint and severally liable” to the creditor, who can then proceed against the non-discharged spouse for the entire debt.

The intersection between bankruptcy law and family law is not an easy place to be. If your spouse threatens to file bankruptcy during the divorce, or actually does so, you should consult a bankruptcy lawyer. However, here is a summary of some of the basics:

- There are two basic kinds of consumer bankruptcies—Chapter 7 and Chapter 13. In a Chapter 7 case the debtor receives a “discharge” which eliminates most ordinary debts. There are strict limits on who can file a Chapter 7 and when. In Chapter 13 cases, also called wage-earner bankruptcies, the debtor enters into a plan to pay off some portion, or even all of his or her debts while remaining under the bankruptcy court’s protection.
- If either party files a bankruptcy case, an “automatic stay” goes into effect that blocks most actions by other courts; the party who wants to move the case forward must file a “motion for relief from stay” with the bankruptcy court.
- Child support and alimony orders remain in effect despite the bankruptcy, and the family court may modify them.
- If a bankruptcy is filed, the family court’s final order distributing assets and debts may be reconsidered or even undone by the bankruptcy court.
- If you get a notice of the other party’s bankruptcy, you should file a response listing yourself as a creditor in order to fully protect your rights.
- If you disagree with a proposed bankruptcy discharge or plan, you must begin an “adversarial proceeding” in the bankruptcy court. This is not a do-it-yourself procedure; you should have a lawyer for this.
- Allocations of property and debt made by the family court that are made “in the nature of alimony” or as a “domestic support obligation” are likely not dischargeable, although this will depend on the bankruptcy judge’s evaluation of the family court order.
- As we note elsewhere, one party’s bankruptcy may make the other party 100% liable for all debt held in both names—so be careful.

How Judges Assign Responsibility for Transaction Costs

Transaction costs are those related to the divorce case itself. The most common examples are attorney fees, guardian ad litem fees and expert witness costs. We have seen cases where such transaction costs have amounted to \$100,000 or more, which is one of the reasons we counsel you to try to avoid a contested hearing. State laws vary on how attorney fees and other transaction costs are allocated. Make sure you understand your state’s law on this topic.

Many states permit the family court to make one party pay some or all of the other party's attorney fees and other transaction costs. In such states, if the parties have incomes or other resources that are equal or close to equal (less than a 25% variation) judges are more likely than not to require each party to bear their transaction costs. If the parties have significantly different incomes or available assets, the judge may require the higher income party to bear some, or even all, of the other party's transaction costs. This can happen close to the start of a case, by an order requiring the higher income party to advance the lower income party a sum to pay the initial retainer of the second party's lawyer, or it can come at the end of the case, where an attorney's fees order may be included in the final judgment or decree.

An important word of caution here—even if there is a significant difference in the parties' incomes, judges will often not order payment of extravagant legal fees, or fees that have been increased by one party's hiring of a number of lawyers, causing repetitive or duplicate work to be billed. Judges can also take a party's conduct of litigation into account when making, or not making, attorney's fee awards. If a judge feels that the lower-income party has frivolously increased the cost of bringing a case to finality, the judge will not be likely to award fees for those parts of the case, and may even order the lower income party to pay a portion of the higher income party's legal fees.

How Judges Allocate Retirement Assets

We spoke earlier about the parties' home as being one of their most valuable assets. Most people instinctively know this. However, many people seem not to be aware that the value of a pension, especially if it is a defined-benefit plan, is often their next largest single asset.

Judges will usually first determine what portion of a retirement asset is a "marital portion" and what portion is a "non-marital portion." For example, if a party has worked for a company for 15 years, and the first five years of the employment was before the marriage, and the latter 10 years after the marriage, one third of the pension (the non-marital portion) will be wholly allocated to the party that earned it, and the other two thirds (the marital portion) may be equitably divided. (This may not be true in "community property" states.) If the parties have similar earning histories, and roughly equivalent retirement assets, a judge will usually simply leave the parties with the retirement assets they each have. However, if there is a difference in their work histories, this may mean an unequal entitlement to Social Security benefits, or an unbalanced set of retirement assets, or both. In this situation judges will usually allocate the retirement

assets, perhaps equally, or perhaps unequally, to ensure that each party will receive a reasonable level of retirement benefits in their elder years.

If the court allocates a portion of a party's IRA, that share should be deposited into a "roll-over IRA" set up by the receiving spouse. It is very important that those assets be deposited into a roll-over IRA or other tax-qualified vehicle. If not, the distribution may be treated as an early withdrawal, which can have very negative tax consequences.

If the court divides a party's pension plan it will almost always do so by means of a "Qualified Domestic Relations Order" or QDRO. (This is commonly pronounced as a "quad-row.") Courts will usually include a provision in the Divorce Judgment reserving jurisdiction to later enter an appropriate QDRO, as every pension plan administrator requires their own specific language. Some plans make it very easy to submit a QDRO; an employee can obtain a fill-in-the-blank style of order from their personnel department. Other administrators or employers make it almost impossible to obtain approval, requiring multiple rounds of proposed documents to be submitted. Even if you have completed your entire divorce amicably and without a lawyer, if you find yourself in the second situation, you may well have to hire a lawyer, just to negotiate the QDRO language with the plan administrator. [\[12\]](#)

How judges decide alimony and allocate income

Virtually every state has provisions in its laws which allow a court to make an order requiring one party to make some kind of payments to the other party, even after the marriage has been officially terminated. These kinds of laws provide for payments that are usually called "alimony" or "spousal support." A court can order that one party pay temporary or interim alimony to the other while the family law case is pending. A court can also order payment of alimony once the case is over, whether or not it has ordered temporary payments.

The most important thing about alimony is that it is governed by the law of the state where the divorce takes place. Unfortunately, the various states' laws vary dramatically. Some states have formulas for calculating alimony. Other states, like ours, have not enacted a formula, but have adopted "rebuttable presumptions" which are like guideposts, that give a trial judge guidance about types of alimony or a range for payment amounts or payment periods. Most states allow payments over a period of time. Most also allow a judge to make a "lump sum" alimony award instead of, or in addition to, a periodic payment plan. State laws may also allow a judge to make an unequal

allocation of real or personal property instead of an alimony award. Other laws provide for “reimbursement alimony” which allows a judge to order one party to pay the other out of otherwise untouchable personal or non-marital funds, if there is no other way to achieve a fair result. You will have to have some understanding of the alimony laws in your state as you evaluate whether to request alimony, or agree to pay it.

Whatever your state’s laws, there are a few constants. The federal Internal Revenue Code provides that alimony paid periodically (such as weekly or monthly) is deductible to the payor and is income to the payee. However, lump-sum alimony can be characterized as a property settlement rather than alimony, in which case the payment is neither taxable nor deductible to either party.

In many states the court may consider whether a party is or has become voluntarily unemployed or under-employed. If so, the court may base its alimony award on the party’s earning ability as opposed to his or her actual income. As noted in the introduction, and in our discussion of child support, it is not uncommon for parties to manipulate, or attempt to manipulate, their incomes while a family law case is pending. There is an increased ability to engage in these maneuvers if one or both partners are self-employed or are an officer in a closely-held business. In our experience, these disputes are more likely to occur if a business has a significant cash component. Unfortunately, these concepts have led to lots of contested hearings about a party’s actual income or earning capacity.

Many judges prefer to avoid awarding periodic alimony if possible, by a lump-sum award, or by an unequal division of property, or by some other means. There are two reasons for that preference.

The first is that some judges believe that a periodic alimony award invites future litigation. The payor would often rather do almost anything each week than write the alimony check. As a result, payments are often not made or are delayed. This can force the payee spouse to file a motion for contempt or a motion to enforce. Either party may later allege a “substantial change in circumstances” and file a motion to amend the alimony award. The payee might try to show that his or her income has gone down, and that alimony is no longer affordable, or that the other party’s income has gone up, and alimony is no longer needed. The payor might try to show that his or her expenses have gone up, or that the payor’s income has gone up, so that a higher payment is appropriate.

The second reason is that periodic alimony for more than a brief time prolongs the parties' financial entanglement with each other. Some judges prefer to structure judgments so that the parties can make a clean break from each other, at least financially, and try to avoid creating a situation where the parties will be coming back to court again. However, there may not be sufficient assets to take care of things all at once. In such a case there may be no alternative to an alimony order that requires one party to make monthly or weekly payments to the other.

However, if there is no alternative, and one party is ordered to pay alimony to the other by periodic payments, it is common for judges to also order that the payor either obtain or continue an existing life insurance policy, payable to the other spouse. This is to ensure that in the event of the payor's untimely death, the payee will be protected and will receive a benefit equivalent to the payment stream that was originally ordered. Unless covered by such a life insurance provision, alimony usually terminates on the death of the payor. One of the problems with a periodic alimony order is that it can often be modified if one party can demonstrate a "substantial change in circumstances." While these provisions of the divorce laws are designed to protect either party from an event that could not have been predicted at the time of the divorce, they are also an invitation to future litigation. Some divorce judgments try to avoid this problem by including a clause that says that alimony cannot be changed at all; others include a provision that provides that alimony can be adjusted upward, but not downward. However, under some states' laws, even if the parties agree that alimony can never be changed, a judge may later decide to override that provision, especially if a clear injustice would result.

In our state, the law says that if a party is not awarded alimony at the time of the divorce, he or she can never come back and ask for it later, even if there has been an unanticipated change or event. Parties and their lawyers sometime agree to avoid this problem, or judges decide to accommodate it, by an award of "nominal alimony," that is, payment of \$1.00 per year from one party to the other, or in both directions.

Finally, many alimony clauses include provisions which say that alimony will stop early if the recipient remarries or cohabitates with a new partner, or if the recipient establishes a long-term relationship with a new partner. Only the first type of early termination clause—termination on remarriage—is reliably enforceable. The other types—termination based on cohabitation or a long-term relationship—are

likely to generate very ugly and unpredictable contested hearings. We have seen cases where the payor assumes that alimony will automatically terminate early on the remarriage of the recipient, even though the divorce judgment does not say so. Unless your state's law provides for automatic termination of alimony on remarriage, make sure the divorce judgment spells it out.

When “Palimony” May be Available

In most states, alimony is only available to a lower-earning party if the partners involved in the case were actually married. However, some states have recognized a legal basis for similar claims between unmarried partners, arising out of “equitable” legal concepts such as unjust enrichment or fraud. This type of award is often called “palimony,” and we will use that term as a shorthand reference here. Whether or not palimony is available is highly dependent on the state you reside in.

Our Supreme Court has made it clear that alimony can only be ordered if the partners were legally married. However in California (and perhaps some other states) the courts have recognized equitable support orders between unmarried partners as an option for a limited set of cases, such as one where one unmarried partner has made a legally enforceable promise to support the other “for life.”

If you think you may be entitled to palimony, or if you think your partner or ex-partner has a good basis to make such a claim, you should have a lawyer! Right now! This is not an area for non-lawyers to attempt do-it-yourself litigation.

Conclusion

Unfortunately, if a family case is contested, it is more likely than not that the underlying issue is money. Sometimes, the underlying financial issue may be disguised. A good example of this is when parents argue about a contact schedule for their children because of the positive or negative effect a particular schedule or residential arrangement will have on the amount of the child support one party will have to pay, or the other is going to receive.

Whenever the underlying issue is a financial one, it is particularly important that both parties take a deep breath and do a cost-benefit analysis. If you have a lawyer, ask the lawyer for an estimate of what you are likely to achieve by doing battle in court and also an estimate of the fees and costs of doing battle. If you wind up getting a \$25,000

award but you had to pay your attorney \$30,000 to achieve it, you may be happy with your moral victory but you will be \$15,000 worse off than if you had settled for \$15,000, but only paid your lawyer \$5,000 to get that result.

This difference may be worth it to you, perhaps because you know it cost the opposing party \$40,000 in fees and lost earnings, but more likely you would have been happier with the better result, especially if you had to expend less blood and sweat and fewer tears to get to that point.

Chapter 4

If You Have Children Together

“To maintain a joyful family requires much from both the parents and the children. Each member of the family has to become, in a special way, the servant of the others.” — Pope John Paul II

Why this Chapter is a Must-Read for Both Parents

If you and your co-parent are headed to court regarding a disagreement about your children, you both should read this chapter right away, particularly if either of you is not represented by an attorney. This chapter will help you predict how a judge might decide the contested issues presented at a court hearing. If your case is going to mediation, reading this chapter will help each of you assess how reasonable and practical your goals are.

Reading this chapter will help you and your co-parent evaluate your situation and your prospects in court more realistically. Doing that will, in turn, help each of you evaluate the *pros* and *cons* of going to trial versus coming to an agreement.

Parents who understand how courts make these decisions, and who are looking at themselves and their children realistically, are often able to come to a reasonable and realistic agreement on what to do. This is because people who are looking at the same information through the same lens of practicality and reasonableness are likely to be able to develop enough common ground to resolve their differences. On the other hand, parents who do not know, or do not care to know, how judges make decisions involving children may be headed for a rude and nasty awakening in court.

Unfortunately, if one parent is being realistic and the other is not, a judge may still need to decide contested issues. You may be entirely reasonable and realistic in all of your assumptions, expectations and goals, but if the other parent is not, then trying to reach a reasonable agreement may be a waste of time. That is why both parents need to read this chapter. So lend your copy to the other parent or buy the other parent a copy.

Sometimes, even when people are being reasonable and realistic, they cannot resolve all of their disagreements. Even if you and the other parent don't resolve all areas of disagreement, you still will be better

prepared for court if you have tried to work them out, because you know where and why the other parent disagrees with you. You will also be better prepared if you read this book because you will understand how judges make decisions. The summary below explains what judges focus on when making custody decisions. It will also give you a good sense of what evidence you should be presenting in court. You need to tell the judge what your plans are for your child in terms of living arrangements, schooling, home environment, health care and so on, but it also is important for you to talk about your aspirations for your child and to explain in concrete terms what kind of parent you have been, in terms of meeting the child's needs. Many judges believe that the best indicator of which parent will serve a child's best interests is which parent has over time been more involved in meeting the child's needs and more actively engaged in raising the child.

How Judges Make Decisions About Children

Understanding the environment in which judges make decisions in cases involving children can help you predict what the judge will consider important and help you persuade the judge of your viewpoint. Here are three factors to keep in mind:

First, judges often make their decisions based on limited time and information. It is not unusual for a judge to come to work one morning never having heard of a child or the child's parents and after a trial lasting a few hours, leave work the same day having made life-changing decisions about where the child lives and goes to school. Because time is short and the decisions are large, judges appreciate parents and lawyers who use the available time effectively, by focusing on important issues and information, not minor details. So keep your eye on the big picture and be organized—not scattered and rambling. You and your attorney, if you have one, will have a limited amount of time within which to make your case. Don't waste the time available; use it wisely.

Second, judges have to make their decisions within a legal framework. That framework dictates what rules the judge has to use in making decisions about children, and also what kinds of evidence (information) the judge may consider in coming to decisions.

- When it comes to decisions about children, judges in every state are required to follow the “best interests of the child” rule, discussed in detail later in this chapter. This means the judge has to focus on what is best for the child, and not on what is best for either parent, or what the child wants, or what either parent wants. Each parent has the

constitutional right to make decisions regarding their child's care, but when the two parents disagree about these decisions those rights give way to the best interests of the child.

- With some exceptions, judges are not allowed to rely on second-hand information. This is known as “hearsay” in the courts. If you don't have first-hand knowledge of the things you want the court to consider, you may not be allowed to present your information, and you may need to present testimony from the people who do have first-hand knowledge based on their own observation.

Know the legal framework that the judge has to follow, and you will likely be more successful in persuading the judge.[\[13\]](#)

Third, judges want to believe they have done the right thing in making their decisions. No one likes to think he or she is making a mistake or bad decision, and judges are no different. If you are trying to convince the judge to give you custody of your child, how you come across as a parent and as a person—both in your testimony in the courtroom and in the situations that will likely be brought up in the courtroom—will make a big difference. This goes beyond your evidence. If you come across as a good and thoughtful parent and a reasonable person, you are likely to impress the court as someone who can be trusted with the responsibility of raising a child. On the other hand, if you have treated the child or the other parent badly, if you come across as a crackpot, a whiner, a mean-spirited bully or abuser, or a mediocre (or worse) parent, the judge will be far less likely to award you custody over the other parent.

“The Pot Calling the Kettle Black”

The father was ready to the max with his evidence for trial. He had his secretly made tape recordings of his ex-wife's phone conversations with the child; he had photographs from when he followed his wife when she went into a disreputable bar with another man; he had copies of material she had posted at online dating sites; he had statements from his relatives full of negative comments about his ex-wife; he had a letter from their child stating how the child wanted to be with daddy not mommy. So daddy had clearly gathered anything and everything he could find to make mommy look bad.

His evidence—the recordings, photos, downloads, statements and letter he compiled—backfired. He succeeded only in convincing me that he was more focused on revenge against his ex- than on the best interests of his child. He must have thought he could convince me to award him custody by making his ex-wife look bad. If he had asked a lawyer or really anyone else to counsel him on changing focus to the

positive, he might have done a whole lot better in court. For example, he might have done better had he focused on his abilities as a father, his track record of attending to the children's needs, and how the children would benefit from his parenting.

— A.M.H.

The “Best Interests of the Child” Rule

The law requires judges to make decisions based on the “best interests of the child.” The so-called “best interests of the child” test is usually considered to mean what is best for the child, taking everything into account. The “best interests” test sounds simple, but as applied in specific cases it can entail a highly complicated and often highly subjective analysis that has a different answer for each child. What is in a child's best interests is obvious in some cases, yet in many, perhaps most cases, it is not obvious.

The legal definition of “best interests of the child” was first used in a New York case in 1925, and most states have since adopted it. However, it differs in details somewhat from state to state. Some state laws spell out a list of “best interests” factors that judges are required to consider, but they usually allow judges to consider factors and circumstances beyond those contained in the definition. The family laws of other states do not define the term “best interests of the child” and leave it to the courts to decide what factors to consider.

You may find the wording of your own state's law by checking the website for your state's family courts. Regardless of how your state's law is worded, the general principle—that courts make decisions about a child based on the “best interests of the child” under all the circumstances—applies virtually everywhere.

Remember the Details

Judges have ways of finding out just how involved a parent has been in a child's life. During a trial over custody in which both parents claimed to have been very involved with the child, I asked each parent to write down the names of the child's teachers and doctor. One parent was able to provide all of the names without difficulty. The other, after much hemming and hawing, admitted to not being able to remember any names, but claimed to have a bad memory for names.

— A.M.H.

Best Interests Factors

This section covers what “best interests” factors judges can apply in making “best interests of the child” decisions about children.

Although the wording of laws regarding “best interests of the child” differs from state to state, every state’s law allows judges to take into account a wide variety of factors in making decisions about children. There is no single factor or formula or guideline that will predict how the best interests rule will operate in a specific situation. Judges know well that every case is different; what makes all the difference in one case may not even apply in other. Even so, there are certain factors that apply in most cases, if not every case. This section discusses these in detail.

Here are some of the “best interests” factors most often considered when judges make decisions about children:

- **Which parent has been the primary caregiver for the child:**

Perhaps the most important consideration in deciding child custody—which parent will have the child most of the time—is which parent has been the primary caregiver for the child over time. In deciding such questions, a judge will focus on day-to-day parenting involvement: Who stays home from work when the child is sick? Who takes the child to doctor’s appointments? Who reads to a young child at bedtime? Who helps an older child with homework? Who goes to parent-teacher conferences? A parent who does these things on a day-to-day basis is showing commitment to the child.

- **The age of the child:** How old the child is matters in several different ways. First, the older a child is, the more likely the judge will take into account the child’s own preferences, if the child has stated any. For example, a seventeen-year-old’s wishes regarding residence and schooling are likely to be given significant weight in the judge’s “best interests” decision, more weight than the stated wishes of a seven-year-old. The child’s age may also affect a judge’s decision about schooling: switching schools may be less of a concern in the lower grades than in the last years of high school. The child’s age may influence the judge’s view of the child’s schedule with both parents: A very young child should not go for long periods without seeing whichever parent has been the child’s primary caregiver.

- **Each parent’s relationship with the child and role in the child’s upbringing:** A judge’s “best interests” decision almost always focuses closely on each parent’s past and present involvement with the child. A parent who has been absent or inattentive to a child’s needs is likely to have a difficult time in court, compared to a parent who has been

actively involved in meeting the child's needs during the child's lifetime. Sometimes both parents provide care for a child almost equally. In such cases, judges often find it helpful to hear evidence focused on each parent's role in meeting a child's needs, whether in preparing meals, taking the child to doctor's appointments, staying home when the child is sick, spending time with the child, or the many other duties of a parent.

• **The preference of the child, if the child has a meaningful preference:** Judges will always take into consideration an older child's preference about where to live, where to go to school, how much time to spend with each parent, and other aspects of the child's life. However, even if the child has a strong preference, the judge will not always go along with it.

One reason why the judge may not agree with the child's preference may be that the child is too young to have what the law calls a "meaningful" preference. A child may be old enough to express a point of view, but too young to think through the pros and cons of the situation in a thoughtful way. Usually there is no hard and fast rule, but a judge is less likely to put much weight on a child's preferences if the child is less than twelve years old.

Another reason may be that the judge suspects that the child's preference is being unduly influenced by a parent. Coaching or "brainwashing" of children by parents happens, though less often than parents suspect. Judges are always alert to the possibility that a child's stated preference is the result of coaching by a parent, and many judges are good at detecting coaching, so don't try it because it usually will be counted heavily against the offending parent.

Sometimes a judge doesn't follow a child's preference because what the child wants is not what is in the child's best interests. Often children are good at recognizing what is in their best interests. For example, to their credit, many teenagers recognize that rules and structure can promote discipline and help them achieve their goals in college and career, so they choose to be with the parent who sets expectations and limits rather than the parent who lets them do whatever they want. Others, resenting those limits and expectations, express the desire to live with the parent who is less strict in enforcing study habits, curfews, etc.

Generally, the factors that will influence a judge to agree with a child's stated preference about what should happen are:

- *That the stated preference is in keeping with the child's best interests:* If what the child wants is also what the judge thinks is best, it probably will happen.
- *That the child is old enough to have a definite point of view:* The older the child, the more cautious the judge will be in going against his or her wishes.
- *That the preference is real:* The more genuine the preference seems, the more weight it will get. A preference that the judge believes has been influenced or even coached by a parent will get little or no weight, and may even work against that parent.
- *The child's current living arrangements and the desirability of maintaining continuity versus the proposed living arrangements and the benefits of change:* The judge will always focus on where a child has been living and on how well that arrangement has worked for the child. Most state laws allow judges to favor continuity in a child's living arrangements over change, other factors being equal. This may mean that the judge will try to avoid disrupting a child's life by ordering a change of residence, which often means changing schools and starting over in making friends, etc. On the other hand, if the present living arrangement does not seem to be meeting the child's needs, most judges will order a change if the proposed living situation promises to do better in serving the child's best interests.

What this means is that the judge will often compare each parent's living situation in terms of the best interests of the child. At the same time, the judge will examine how well the child has adjusted to the home, the school and other aspects of the child's environment. If the current living arrangement is satisfactory, the considerations of avoiding disruptive change and maintaining continuity may favor preserving the status quo, even if the new living arrangement might be slightly better. When a judge changes custody from one parent to the other, it is usually because the parent who now has custody is perceived as falling short in meeting the child's needs, whereas the parent who proposes to take custody has a better plan for meeting the child's needs and better living arrangements for the child.

- **The parenting ability of each parent:** A significant factor in any judge's custody decision will be each parent's ability to be a parent, meaning each parent's ability to love and nurture the child; be a good role model; set limits; provide guidance and advice, and act in every other way in the child's best interests. Some parents are very loving and well-intentioned, but have no real idea how to be a parent, as

opposed to being a buddy or a friend. Other parents carry strictness and control to stifling lengths. There is no such thing as a perfect parent and no child comes with an owner's manual. Different children need different things from their parents. Still, the courts will generally favor the engaged parent over the indifferent parent and the wise parent over the unduly permissive or unduly strict parent.

• **Each parent's ability to handle conflict well and to support the other parent's role in the child's life:** A factor that is very important in cases where the parents don't get along well is each parent's ability to nurture the other parent's relationship with the child, as well as their own. When the court awards one parent custody (meaning primary responsibility for the child's upbringing), the court trusts and expects that parent to act in the child's best interests in every way, including supporting and upholding the child's relationship with the other parent. (Obviously, there are exceptions to this general expectation, such as in cases of domestic violence or child abuse).

Too many divorced or separated parents seem to be in competition with the other parent for the child's love and affection, or seem to see the child as an instrument to punish the other parent. So a parent who has custody may obstruct the other parent's visitation or otherwise try to prevent the other parent from having a meaningful relationship with the child. Likewise, a parent who doesn't have custody may tell the child not to obey the other parent, or may undermine the other parent by letting the child get away with things that the other parent would not allow.

When two parents don't do well in getting along, the judge often looks closely at the situation to see which parent is mostly responsible for the conflict, and which parent is not. If there is a guardian ad litem involved in the case, the guardian is sometimes asked to examine parental conflict and make recommendations on how to deal with it.

If one parent clearly does a better job than the other at handling conflict and resolving issues, if one parent tries to rise above the conflict and to keep the child out of it whereas the other parent puts the child in the middle and creates problems, the judge will likely consider that difference in making decisions about the child.

• **History or ongoing presence of domestic violence, abuse or other risk to the child in the home:** The increasing sensitivity to domestic violence and child abuse means that courts are looking ever more closely into the presence of domestic violence or abuse in the home, whether directed by one parent against the other or directed by

a parent against a child. Many states' laws now include specific provisions aimed at domestic violence within a family; our state of Maine, for example, requires that, before a judge may award visitation to an abusing parent, the reasons for awarding any visitation at all must be spelled out.

A parent who the court believes presents a risk to the child or the other parent may be severely limited in contact with the child and the other parent. Visitation may be supervised, meaning that it takes place only in certain locations or only in the presence of another adult, or both. In extreme cases, contact may be prohibited altogether.

The court can also consider in its custody decisions the degree of risk to the child at the hands of another adult living in the home. For example, if one parent's partner has been convicted of sexual offenses against children or has been violent to the parent or the child, the court can limit the child's time in the home, or require the parent to have visitation with the child away from the home and outside the presence of the partner.

• **Any other factors bearing on the physical and psychological well-being of the child:** Many states also allow judges making custody decisions to consider any other circumstances that bear on the child's physical or psychological well-being. An example of such factors involves a child's disabilities or special needs, especially if one parent has done better than the other in meeting those needs over the years.

Here are some common scenarios illustrating how the "best interests" factors help shape family case orders in specific situations:

• **When the Child Has Special Needs:** If the parents disagree about custody of a child with severe special needs, generally the parent who has shown the greater understanding of the child's needs and the higher level of commitment and reliability in meeting those needs over the years will be awarded primary responsibility for the care and upbringing of the child. Sometimes this translates into a question of which parent has the greater resources (meaning more money or more time) to help meet the child's special needs. Sometimes, this may seem unfair to the other parent, who would like to be more involved in helping the child, but the court's focus has to be more on the best interests of the child than on fairness to the parents.

• **When the Parents Don't Get Along:** If parents really don't get along, the court may set up safeguards to assure the child is not

unduly exposed to conflict: pick-ups and drop-offs may take place at a public place (we sometimes think the family court couldn't operate without McDonald's) or even the police station. In awarding custody, the court will often place the child with the parent who the court believes is more committed to making things work out, and who is doing a better job handling conflict constructively and supporting the role of the other parent.

- **When the Parents Live Far Apart:** When parents live far away, visitation during the week and on regular weekends is likely out of the question. Judges often go to great lengths to protect the parent who does not have the child most of the time, because that parent's relationship with the child can be put at risk by the long separations that happen with great distances. The judge will often require the parent who has the child most of the time to assure that the child talks by telephone and communicates via e-mail often with the absent parent. The other parent may be awarded visitation with a school-age child during most of the available school vacation and summer vacation time, to make up for not seeing the child regularly during the school year. A new technological option is to require the parents to set up a video link with web cameras and computers, so that the faraway parent can stay in visual contact with the child.

- **When One Parent Has Been Absent:** Sometimes one parent has been more or less absent from the child's life, and wants to return. Such situations often produce a dilemma for the court. On the one hand, it is generally in a child's best interests to have a good relationship with both parents, even if one has been absent in the past. On the other hand, it may not be in a child's best interests to have a parent coming and going unpredictably. In such situations, the courts often leave visitation in the hands of the custodial parent, if the court trusts that parent to encourage the relationship between the child and the absent parent, so long as the absent parent develops a pattern of reliable visits.

- **When a Non-Parent is Doing the Parenting:** Sometimes neither parent is actually bringing up the child, and the child is residing with a grandparent or another relative. This is most common when one or both parents are in the military overseas, away for a job for a long period, in prison, addicted to drugs or otherwise unavailable for the child. The same situation arises when one parent is dead and the other is unable or unwilling to raise the child. Most states allow custody of children to be placed with non-parents in such situations, and the parents may or may not be allowed regular visits with the child.

- **When the Child Has Been Abused by a Parent:** In cases of proven child abuse by a parent, it is common for the court to prohibit any contact by that parent with the child. In the much more difficult case of alleged but unproven child abuse, contact may be limited or prohibited until further investigation. The reality, however, is that such investigation often yields inconclusive results, and the court has to decide when to bring the restrictions to an end. Often the court limits contact initially and imposes conditions such as supervision until such restrictions are no longer necessary.
- **When there is a Criminal Case:** When one parent is charged with assaulting the other, it is very common for the criminal court to impose bail conditions prohibiting the parent charged from contacting the other parent and sometimes the child, if the child is alleged to have witnessed the assault. Even when the bail conditions do not specifically prohibit contact between the parent charged and the child, they can have that effect, because the parent has no way to see the child without contacting the other parent in violation of bail. The bail conditions trump whatever contact may have been awarded by a previous family court order.

Sudden Changes of Custody: Rescue or Kidnapping?

Sometimes one parent takes custody of a child without any legal authority and prevents the child from seeing the other parent. In court, the parent who has taken custody argues that the child needed to be rescued from being harmed or put at risk by the other parent. The other parent argues the opposite. The judge has to decide where the truth lies and what to do.

We have one piece of advice for a parent who, without having a court order authorizing it, cuts off the other parent's access to a child: *you had better be right*. Especially if you are acting in violation of a court order, but even if there is no court order prohibiting what you plan to do, you are likely to pay a heavy price for being wrong.

One of the factors judges consider in deciding custody issues is whether each parent is prepared to support the child's relationship with the other parent. If the court order calls for the child to reside with one parent most of the time and to visit regularly with the other parent, the court wants to be sure that both parents will follow the order, and support the child's relationship with the other parent.

A parent who cuts off the other parent's connection with the child had better be able to justify that step in terms of the best interests of the

child. Sometimes it is not in a child's best interests to have a relationship with a parent, as in cases of serious abuse or neglect. In such cases, the other parent should take action to protect the child, including, if necessary, preventing the abusive parent from seeing the child. Aside from those situations, however, courts usually assume that a child should be allowed to have a strong relationship with both parents, and will not look favorably on a parent who refuses to accept that proposition. If the court sees one parent obstructing the other parent's access to the child without justification, the court may decide that the child is better off being with the other parent, if that parent will do a better job of assuring that the child can have a good relationship with both parents.

If you feel compelled to protect your child by cutting off or limiting the other parent's access, it is extremely important to ask the court to review the situation by filing a court case if none has already been started, or by asking the court to change the court order if one is already in effect. Do this right away. Asking the court to review your action in cutting off or limiting the other parent's access will help show that you respect the court process and are willing to be held accountable and justify your action.

Do Courts Favor Mothers over Fathers in Custody Decisions?

In many cases of disputed custody, it is the mother who ends up having the child most of the time. Sometimes this is because the father is missing in action as far as being there for the child is concerned, and hasn't shown much commitment or involvement as a parent. (Mothers sometimes do that, too.) But even when both parents are willing and able to provide care for their children, frequently it is the mother who is awarded custody of the child for most of the time—during the school week, for example—with the father awarded custody on some or most weekends, and time during vacations. Many men believe that this shows that the courts systemically favor mothers over fathers when it comes to custody of children. We can't say that such favoritism never happens, but it is not supposed to. Courts are supposed to make decisions about children based on what is best for the child, without automatically favoring mothers over fathers. No state allows judges to give automatic preference to mothers over fathers. Every state requires judges to make decisions about children on a gender-neutral basis.

We like to think the explanation for why custody is often awarded to mothers is more accurate is that the mother is often the parent more actively involved in meeting the child's needs: Who stays home from work when the child is ill? Who takes the child to medical appointments? Who is in touch more often with child care providers,

teachers, doctors and the other adults in the child's life? In our own families, this is certainly true.

In situations in which one parent works outside the home and the other does not, it is usually the non-working parent—often the mother—who takes care of the children while the other parent—often the father—provides for the family. When a judge awards the non-working parent—often the mother—custody of the children, the other parent—often the father—feels unfairly treated and may believe the court is biased in favor of mothers.

In those situations when the mother over time has done more than the father to meet the child's direct needs, the "best interest" factor that focuses on which parent has been the primary caregiver might point to awarding primary custody to the mother, with significant rights of visitation to the father.

The parent who asks for primary custody and does not get it is very unlikely to step back and acknowledge that the judge was right. Instead, human nature makes it probable that the parent will look for other reasons, such as bias on the part of the judge or the guardian ad litem.

As judges, we have done our best to honor the principle of gender neutrality, and both of us have awarded custody to fathers when the best interests of the child support that. The reality is that most court decisions necessarily favor one party over the other in awarding time with children. It is relatively unusual for parents to share custody so that each has the children exactly 50% of the time. In our experience, when one parent has the children for more than half the time, it is because that parent has shown more commitment to the children, not because that parent happens to be the mother.

What to Expect in a Court Order About Children

Family courts handle a wide range of cases that call for judges to make decisions on all kinds of issues. However, the issues and decisions generally fall into three areas:

- Parental decision making in areas like schooling and health care
- The child's schedule with each parent
- Financial issues such as child support

This part of the chapter focuses mainly on the first two areas—parental decision making and the child's schedule.

The parental decision making that the courts typically deal with

involves important, long-term decisions affecting the child's welfare and well being, such as decisions about schooling or medical treatment for serious health problems. Court orders usually do not address short-term, less significant decision making, because the court normally assumes that whichever parent has the child on a particular day will make short-term decisions, such as what the child has for breakfast or what time the child goes to bed. There are exceptions to every rule, however. For example, if a child has food allergies, and one parent has not paid attention to the child's diet, the other parent can ask the court to spell out in the order what foods the child cannot be given for breakfast.

Court orders usually define schedules by stating which parent will have the child during which times. It is common for the court order to set up a schedule that applies during typical weeks, and to spell out special schedules for holidays, summer and school vacations, and so on. Sometimes the court order will spell out how and where the child will be transferred from one parent to the other.

This section explains how court orders deal with different situations in terms of assigning decision making authority to parents and setting up custody schedules. It may help you make a realistic assessment of what to expect from the court in your situation.

At the very end of this chapter, you will find examples of court orders assigning decision making authority to parents in such situations as schooling, activities, medical treatment and religion. You will also find examples of schedules to fit different situations. We provide these samples for you to use if they fit your situation, and also to help you decide what to ask for.

Decision Making Authority: How Court Orders Address Different Situations

Most family court orders define how decision making authority is awarded and what the child's schedule will be. What the order says, and in what detail, depends on factors such as whether both parents are actively involved in the child's life, how well the parents get along, and whether they live near each other or not.

Judges usually start from the premise that it is in a child's best interests to have a strong and positive relationship with both parents. Sometimes this is not the case: a parent through very bad or even criminal behavior can forfeit any right to a relationship with the child, but those situations fortunately are not common. So, the starting point

for the judge in most cases is that each parent should be actively involved in the child's upbringing, and also that the child should be with each parent regularly so as to maintain a strong relationship with both parents.

Based on these assumptions, judges in our state usually assume that parents should share decision making responsibility for the child, unless there is a good reason otherwise. (Other states' laws do not favor shared parental decision making). In specific situations, shared decision making may not be possible, and may not be in the child's best interest.

To illustrate these points, here is how court orders might define decision making authority in different situations:

Single Parenting: When one parent, whether by choice or necessity, is absent or not involved in the child's life, and the child is being raised by the other parent, it is common for a court order to award the parent who is raising the child the right to make important or long-term decisions for the child, such as schooling and health care. The other parent may give input or suggestions, but the parent who has been given decision making authority gets to make the decision whether the other parent agrees with it or not. It is also common for the court to award the parent who is raising the child the authority to decide when the child will see the other parent, although sometimes the court order will spell out the days and times when the other parent is allowed to see the child.

If you are the parent who has done the child rearing thus far, you may need to be open to more involvement by the other parent. On the other hand, if you are the parent who has not been involved much, be prepared to accept a limited role, at least for the time being. It is fairly common for a parent who has been absent from a child's life for a while to want to be more involved. It is also common for the other parent—the one who has been there for the child rearing—to be resentful and reluctant to share the child with the other parent. The court in such situations expects the parents to work things out for the benefit of the child.

This means mostly that each parent must respect the other parent's role. Even a parent who has been absent from a child's life should have the opportunity to build or re-build the relationship, provided that doing so is in the child's best interest. On the other hand, the parent who has done most or all of the parenting often should continue being the primary caregiver for the child, provided that

being so is in the child's best interest.

Both Parents Involved and Getting Along: When both parents are actively involved in the child's life, are getting along well and are able to reach agreement, the court order will usually say simply that the parents will share decision making authority and will also share the child's time by agreement. In such situations, the court is counting on the parents to work together as parents for the benefit of their children, although they are no longer together as spouses or partners. Parents who get along and make decisions together don't need a court order spelling out all the details of how to raise their child together. The parents themselves fill in the details as they go.

Both Parents Involved and Not Getting Along: Parents who don't get along likely will have trouble making decisions together. Even when parents don't get along, the court order often calls for the parents to share decision making authority. The court hopes that, once the court case is over, the parents will act like the adults they are, put their differences aside and make decisions together as parents. The court order may require the parents to engage in counseling, mediation or other activities designed to improve their relationship and thus their ability to make decisions together for their child.

Sometimes, however, the court recognizes that the parents may not be able to make decisions together. In fact, the court may decide that forcing the parents to try to make decisions together will create conflict and work against the child's best interest. In such situations, the court may divide or allocate decision making authority between the parents, by assigning each parent particular types of decisions, or by giving one parent complete decision making authority. Court orders that divide authority usually say which parent decides about schooling, which parent decides about health care, and so on. Court orders that give one parent final decision making authority sometimes require that parent to at least consult with the other parent and take the other parent's suggestions and viewpoint into consideration before making decisions.

Both Parents Involved and Living Far Apart: Shared decision making can be particularly hard when the parents do not see each other often. In those situations, the court order often will give each parent the ability to make decisions during the times the child is with that parent. For example, when parents live far apart, the court order might call for the child to live with one parent during the school year, and to be with the other parent during school and summer vacations. The order might give the first parent the authority to make decisions about

schooling, and the other parent the authority to make decisions about summer activities, although the order might also require each parent to keep the other informed about the child and to consult with the other before making major decisions. This division of responsibility recognizes the difficulties presented by the geographical separation between the parents, but encourages shared decision making, at least up to a point.

Home is the Sailor, Home from Sea...

While the two children were young, the father had been a merchant marine at sea for most of the year. As a result, the marriage failed, he and his wife were divorced, and the children lived with her and saw him very little. When the children became teenagers, he decided to move back home and rebuild his connection with his children. This would mean a reduction in his income because there were no shore jobs that paid what he had been making at sea. The children's mother objected to any reduction in his child support payments to her. The father, who had always paid faithfully, said that unless support was cut he would have to stay away at sea, and miss out on belatedly getting to know his children.

I decided that it was in the best interest of the children to reduce child support if that is what had to be done in order for their father to be actively involved in their lives. Obviously, my decision was based on the evidence that no shore jobs were available for comparable pay and on the father's commitment to spend a lot of time with his children. I scheduled the case for a six-month review, and at that review, was happy to hear that things were going as the father had promised they would.

— A.M.H.

One Parent Presenting a Risk or Threat to the Child: If the child might be at risk by being with one parent, the court order will often place decision making authority with the other parent, at least in those areas in which the court has proof that the other parent cannot be trusted with that responsibility. Also, the court order can limit the decision making authority of the parent who presents a risk to the child, by spelling out safeguards designed to eliminate the risk.

Here are a few examples of how a court might respond when one parent has been shown to be irresponsible when the child is concerned:

- A parent with multiple drunken driving convictions, or who has put the child at risk in a driving situation, might be prohibited from driving with the child in the vehicle.

- A parent who has abused or is suspected of abusing the child might be permitted to see the child only under controlled situations, such as in a public place or only in the company of another adult. Visits in the company of another adult are often called “supervised visitation.”
- A parent whose current partner has abused or threatened the child might be prohibited from allowing that partner to be around the child.

The cases in which abuse or other misconduct by a parent against a child is suspected but not proved present a challenge to the courts. It is very difficult to prove, or disprove, that a parent has abused or harmed a child when there are no witnesses other than that parent and the child. When the child tells a parent of abuse by the other parent, the parent naturally wants to limit or cut off contact between the child and the other parent. However, proving abuse or harm may be difficult or impossible. On the one hand, the best interests of the child call for any uncertainty to be resolved in favor of the child’s safety. On the other hand, it is unfair for a parent to be cut off from the child without proof the parent has done something wrong.

Most judges faced with that dilemma will try to strike a balance between safeguarding the child and avoiding injustice to the accused parent. For example, the court order might say that the parent has to have supervised visits with the child for some period of time (a few weeks or a few months). If everything goes well, normal parent-child contact resumes. This middle-ground approach often leaves both parents unhappy—the accused parent feels wrongly punished; the worried parent feels her or his concerns have been ignored. Such an approach, however, shines a light on the unproved accusation—enough to let it be validated or not—without either ignoring it or allowing it to prevail in the long term.

Effects on Children of Exposure to Domestic Violence

When a child is exposed to domestic violence, the effects go beyond the child’s immediate physical safety. A growing body of research indicates that exposure to domestic violence can cause serious long-term psychological trauma to a child, with consequences that can extend well into adulthood. The same can be true of children exposed to long-term conflict between their parents, even if it never actually involves physical violence.

Such children can have difficulty forming relationships of their own, difficulty maintaining stability in employment and living arrangements. Most tragically, children who witness violence between parents, or who experience physical abuse by a parent, can grow up to be violent themselves.

All of these considerations help explain why judges take domestic violence and parental conflict as seriously as they do.

One Parent Presenting a Risk or Threat to the Other Parent: Judges will take into account domestic violence between parents so as to minimize the risk of harm to the abused parent, usually by limiting or eliminating contact between the abuser and the victim.

Thus, in situations involving proven serious domestic violence (such as actual physical injury, or threats to kill or other acts of actual or threatened violence resulting in criminal convictions), the court may decide that the abuser has forfeited his or her rights as a parent, and thus award the abuser no rights at all with respect to the child—no right to make decisions, no right to see the child, and no right to have any role whatsoever in the child’s life (except to pay child support).

In less serious cases, the court will try to avoid requiring the victim of abuse to have contact with the abuser, by awarding decision making authority to one parent only (often the victim), and giving the abuser only the right to see the child under conditions that don’t involve contact with the victim and that assure the child’s safety. For example, under this kind of order, instead of the abuser and the victim exchanging the child directly, a third person might be involved.

Abuse Situations Between Parents

They had been sexual partners but the relationship had already ended when he came to her house and forced her to have sex. Around nine months later she had his child, and a few months after that, a jury convicted him of raping her. It was not clear whether the child was conceived at the time of the rape or a few weeks earlier, when they had had consensual sex.

It didn’t matter. When their case came up in court, he was still in prison. He wanted to be awarded parental rights and she wanted him to have none. Based on the rape conviction, I awarded her sole parental rights, and gave him no rights at all, meaning he had no legal right to even see the child. He did not understand that. On his release from prison he may still have to pay child support. He definitely did not understand that. Many people think that by paying child support, they are buying the right to have time with the child and other parental rights. Not so.

— A.M.H.

Children’s Schedules: How Court Orders Address Different Situations

As noted earlier, a judge's starting point in designing a child's custody schedule often is based on the child's best interests to have a strong relationship with both parents, and that the schedule should be designed to accomplish that goal.

That does not necessarily mean providing equal time with each parent. In fact, equal time arrangements often sound good in theory, but are very difficult to implement successfully.

When the Parents Don't Need a Defined Schedule or the Child is Too Old for One

Often a family court order will not define the child's schedule in terms of specific days and times. Instead, such an order might say simply, "The schedule for the child with each parent shall be determined by agreement," or "Each parent shall have visitation with the child as agreed by the parties." Sometimes the order may include a general statement of the parties' intentions regarding sharing time with the child. An example of that kind of statement could be, "It is understood and agreed that over time, each parent will have the child for approximately half the time."

Court orders that do not include a specific schedule usually come about in two situations. The first is when the parents get along well enough to work out a mutually agreeable schedule; most judges will want to stay out of the way. Defining specific days and times might actually be a hindrance to parties who need flexibility and can work things out without the court's help. The second is when the child is old enough to make her or his own decisions about which parent to stay with. Judges know well that, when a child is seventeen years old, the child is likely to want to make his or her own decisions about when to be with which parent. That reality does not always mean the child gets her or his own way. A teenager may prefer to be with a parent who does not enforce rules, and if the court believes a child is at risk by being with one parent, the court can take action. On the other hand, if the child is doing well in school and behaving responsibly, the court will usually not try to dictate a particular schedule with each parent, as long as the child is spending time with both parents regularly.

When the Order Gives the Parents Equal Time with the Child

Equal time arrangements can be important to both parents and children, but they are often hard to carry out successfully. Before you advocate for or agree to an equal time arrangement, think it through.

Equal time schedules work better in some situations than in others. They are easiest when a child is either very young or near adulthood. When the child is very young, school is not a factor, and the schedule can be tailored to the parents' availability. When the child is sixteen or seventeen, the child may be able to get to school and to each parent's home without help from the parents. Equal time arrangements are also easier if the parents live in the same town, or can easily get the child to school. Equal time arrangements also work better when the parents get along, or at least can communicate effectively about the child. Particularly during the earlier grades, parents need to exchange information about such things as homework and school events and activities.

Equal time arrangements can be more expensive, because they usually call for each parent to have a full set of clothing and other things to meet the child's needs. A child who is visiting a parent over the weekend can take an overnight bag, but that option becomes impractical if the child is spending three or four days a week at each parent's house.

Finally, there is some difference of opinion about whether equal time arrangements work for children. One view holds that a child needs a "center of gravity," a place to call home, and that an equal time arrangement can leave a child without that clear sense of home. Others disagree, saying that the benefits of equal time arrangements in terms of the child's ability to bond with both parents far outweigh any inconvenience to the parents or child.

Here is an example of an equal time schedule, showing which parent (P1 and P2) has the children on which days:

Weeks

P2/P1

P2/P2

P2/P1

P2/P2

As you can see, this kind of schedule involves lots of transitions for the child. Because some of these are during the week, this schedule also calls for a high level of good communication between the parents about things like homework assignments and school activities. Some children handle transitions well; others don't. Some parents handle transitions and communications well; others don't. If the parents have a history of bad or no communication, or a history of conflict at transitions, a judge is unlikely to see the kind of schedule shown

above as being in the child's best interests.

When One Parent Has the Child During the Week

At least when children are of school age, the most common custodial arrangement is for one parent to have the child during the week, and other parent to have the child every other weekend, with a regular dinner or even an overnight during the week. Sometimes the parent with less time will be granted an extra weekend periodically, say once a month or once every other month, to help balance the schedule. This type of schedule provides continuity during the school week, and assures each parent regular weekend time with the child. If the parents live more than an hour's drive from each other, the midweek dinner or overnight may not be feasible, so the case for extra weekend time becomes stronger.

Vacation time is normally shared more or less equally. Most school systems have a winter vacation falling around the year-end holidays, week-long vacations in February and April, and a summer vacation lasting eight to ten weeks. It is common for parents to share the year-end holiday vacation equally, and to agree that the child is with one parent during the week-long vacation in February, and with the other parent during the week-long vacation in April. Summer vacation is sometimes shared equally, although the parent who does not have the child during the week in the school year often is awarded more than half the summer, to help balance the time.

It is also common for parents to divide or alternate holidays and special days. One set of parents might choose to divide Thanksgiving Day, for example, so that the child moves from one house to the other at mid-afternoon. If the parents do not live near each other, they might agree to alternate Thanksgiving Days with the child year by year.

A parent-child schedule designed for this common situation appears at the end of this chapter.

The schedule below shows the child with one parent (P1) during the week, except for a Wednesday overnight with the other parent (P2), and the parties alternating weekends. If the mid-week time with the other parent were not feasible, the parties might agree that the other parent shall have the child for three weekends a month, although that would give the first parent only one weekend with the child.

When the Parents Live Far Apart

If the parents live very far apart, even weekend visits may not be possible. When children are in school, one parent is likely to have the child during the week and on weekends. To help assure that the child can maintain a strong relationship with the other parent, it is common for the court to award that parent most or all of the child's school and summer vacation time.

A sample schedule for parents who live far apart appears at the end of this chapter.

Such arrangements are not really fair to either parent or the child. One parent is effectively shut out of involvement in the child's schooling; the other parent loses the chance to enjoy vacation time with the child. But the court cannot overcome the geographical barrier that one or both parents have created.

How to Prepare for a Custody Trial

If your family law case is contested, whether you have an attorney or not, you must prepare in advance for the court hearing. If you have an attorney, your attorney will tell you what you need to do in advance, in terms of gathering documents and contacting witnesses. If you don't have an attorney, you will need to prepare on your own. [\[14\]](#)

Here are some of the major areas your preparation should cover. The two rules you should follow in deciding what to present in court are:

- *Always be accurate.* Don't claim something is true unless you can prove it. If the judge thinks you are stretching the truth or exaggerating, or are presenting inaccurate information, even in small things, the judge may not put much stock in anything you have to say.
- *Avoid mudslinging.* What family court judges hate as much as anything else is when parents engage in petty mudslinging against each other. Sometimes negative information about a parent needs to be brought forward to help the judge make good decisions in the child's best interest. Too often, however, parents engage in petty sniping at each other about trivial disputes. In those cases, the judge might wish there were a magic wand to give the child a different set of parents.

If you have negative information about the other parent, present it only if it is both important and true. One way to tell whether you are mudslinging or not is to ask yourself if you are presenting the judge with facts or simply your speculation or opinion. Another way is to ask yourself why you feel it necessary to present negative information about the other parent: is it because the judge truly needs to hear the information in order to make a good decision?

Each parent's background: Keeping in mind that time is limited, prepare to present information about yourself that will help show the judge that you are a stable, responsible parent. It may also be appropriate for you to present information about the other parent, to help the judge make informed decisions about your child.

Information that can help build a judge's confidence in you includes your education, a stable work history, a supportive family network, community activity and service, and involvement in your children's lives, whether at home or in academics, sports or other activities.

If there is anything negative in your background, you may or may not decide to volunteer that information to the judge. But if the other party brings it up, or if the judge asks you a direct question about it, you definitely must be forthright and honest in your answer. Even if you are not asked directly, you should still consider disclosing negative information if it might affect the judge's decision.

A parent who has a criminal record may or may not decide to tell the court about it. If the record is for a minor offense 25 years ago, the judge is likely to disregard it. But if it is very recent and particularly if it is for a crime that might reflect on your fitness as a parent, then you risk looking as if you are covering it up if you don't disclose it.

Each parent's current situation: When a judge has to decide which parent should be awarded custody of a child, it is crucial for the judge to have good information about each parent's living and work situation.

The judge also will focus on how stable your situation is. If your living situation or job has been uncertain, if you have moved around often, or changed jobs often, or been out of work often, be prepared to explain why, and be prepared to show the judge how you will be able to provide your child with a stable and supportive living environment.

If the other parent's situation is clearly unstable compared to yours, you should present the facts that show that. Avoid injecting your own

opinion. The judge will be able to draw her or his own conclusions based on the facts you present.

Each parent's parenting skills: We have to pass a test and get a license to drive a car, but to become a parent, all we need is the right physical equipment. There are too many mediocre or downright lousy parents in the world, so anything you can do to show you are a good parent will help your case.

When a judge has to decide which parent should be awarded custody of a child, the judge needs to decide which parent will make better decisions for the child, will nurture the child's growth in mind, body and spirit, and will keep the child safe from harm.

Think about and be prepared to describe the different ways you have helped your child over the years, whether your help involved providing care or assisting with homework; supporting the child's involvement in sports or other activities; counseling the child with a problem, or helping the child out of a difficult or threatening situation.

In the same way, be prepared to present information about the decisions you have made over the years on behalf of the child—setting limits at home, arranging for medical or other care, helping with schoolwork or arranging for special placements at school.

If you have taken any parenting education classes or have any training or experience in working with children, be prepared to describe those things and provide certificates of completion.

Be factual and accurate in presenting information about the other parent's parenting skills (or lack thereof). Any criticism of the other parent must be well-founded and important, or the judge will dismiss it as mudslinging on your part.

Each parent's commitment: Some people are pretty good parents when they are around, but overall they don't show the level of consistency and reliability that parents owe to their children. In making decisions about children, judges will consider information about each parent's commitment to the child. A parent who moves in and out of a child's life, who doesn't provide for the child or pay child support reliably, who can't be counted on when needed, will fare worse in court than a parent who does a better job at being there for the child.

Here, too, it may be necessary for you to present the judge with

information about the other parent's commitment (or lack thereof), and the rules against distorting the truth and petty mudslinging apply.

Each parent's plans for the child: Just as it is important for the judge to hear about each parent's present situation in terms of living arrangements, employment and so on, it is equally important for the judge to know about each parent's plans for the child. If you are asking for custody, you must be prepared to explain how you will provide for your child's needs. Judges regularly encounter parents who want custody of their children but have not developed a plan for parenting their children.

Thus, the judge will want to know about such areas as what kind of home environment you will provide; who else will live in the home with the child; how the child will get to and from school, and how you will provide financially for the child's needs. Other important information you should be prepared to present will help the judge understand the total picture; what are your plan for schooling, daycare, medical and dental care, and things like play areas, parks and other neighborhood features.

It is especially important for the judge to know if either parent plans any major changes that would affect the child or the other parent. The major change that often causes most disruption and opposition is one parent's plan to relocate, with the child, to a distant state or even another country. Likewise, judges often encounter parents who demand to be awarded equal time or more time with a child, but are not able to spend that time with the child.

Relocation Cases

What are sometimes called "relocation issues" are perhaps the most common example of major changes that the court must consider in making custody decisions. Relocation becomes a real issue when the parent who plans to relocate to a different area or state also plans to take the child. If the relocation goes through, the parent who is left behind may lose regular visitation with the child, and may lose the ability to maintain a relationship with the child.

Relocation cases come to family court in different ways. Sometimes the parent who plans to relocate comes to family court asking for permission to take the child along. Sometimes the other parent comes to family court asking that the child stay behind. Sometimes relocation issues don't come to family court until after one parent has already moved away with the child.

If you have plans to move out of the area with the child, or if the other parent does, the court definitely needs to know. Most child custody orders assume that the parents will continue living where they are (or at least in the same area). In fact, some orders specifically prohibit either parent from relocating the child out of state or outside the area without permission from the court.

Short-distance moves that don't affect a child's schooling and don't affect the other parent's ability to see the child regularly usually do not require the court's permission. However, if a move would make it more difficult for the other parent to see the child or require the child to change schools, the parent who intends to move with the child usually must get the court's permission before making the move. Even if the order does not specifically require the court's permission in advance, at a minimum the parent who plans to move must give the other parent advance notice, so that the other parent has time to ask the court to decide if the move is in the child's best interest.

If there is a disagreement about one parent's plan to move with the child, and if it cannot be resolved without involving the court, either parent should bring the situation to the court's attention as soon as possible. Otherwise, the parent who intends to move will have to decide whether to make the move without the approval of the court, or to postpone the move until the court can decide whether to approve it. Moving without court approval is very risky, especially if it is contrary to an existing court order. There are cases where a parent who has moved away without court permission has lost custody to the other parent as a result. On the other hand, it may be impossible to postpone a move until the court decides the question. Either way, the disagreement will get worse, rather than better. The answer is to ask for the court's help as soon as the question comes up.

In relocation cases, the issue is the same as in any case involving decisions about a child: Is the planned relocation in the best interests of the child? The question for the family court is, not whether the parent who plans to relocate should relocate (or move back if the relocation has already happened) because the court does not have the authority to tell a parent not to relocate. Instead, the court focuses on whether the parent who plans to relocate should be allowed to take the child along (or send the child back, if the relocation has already happened).

The "best interests" decision in a relocation case usually boils down to the essential question of whether the child is likely to be better off staying or going. In making that decision, the judge will focus on

many different factors. They include:

- Is the move necessary or optional?
- The effect of the proposed move on the child's schooling, health care, friendships, connections with grandparents and other relatives, and general wellbeing: The court has to weigh what would be gained if the relocation is allowed against what would be lost. This assessment may entail comparing the child's new environment to the environment the child would leave behind. To some extent, the assessment also depends on how long the parents and child have been living in the area the child would be leaving. If they are recent arrivals, the child's connections with school and the community may be less strong; if the child has never lived anywhere else, the move would cause a bigger disruption.
- The effect of the proposed move on the child's relationship with the other parent: sometimes a move to a distant place will make it very difficult for the child and the parent who is left behind to maintain their relationship. If that relationship is strong, the court may be reluctant to approve a move that would harm it. If that relationship is weak, the relocation may not matter so much. Usually, the parent who intends to relocate is expected to take steps to make sure the child is able to maintain the connection with the other parent.
- The fitness of the parent who is not relocating to assume primary responsibility for the child: Often the parent who is not moving asks the family court to change custody so that the child stays behind. Usually, whether the family court agrees to this depends on whether the other parent has a strong enough relationship with the child and sufficient parenting skills to be awarded custody. If the parents have both been actively engaged in bringing up the child and the child has a strong connection to both, the judge is likely to feel less compelled to approve the move than if the parent who plans to move is the only parent who should be entrusted with the role of primary caregiver.
- The parent's reasons for relocating: If a relocation would be detrimental to the child's strong relationship with the other parent, the parent who plans to move usually needs to have a very good reason to relocate, and the reason needs to be good for the child, not just good for the parent. For example, a parent's plan to move back to his or her hometown to be close to family might be viewed as a better reason than a move to get a better job. The move to be with family may enable the child to strengthen relationships with grandparents and others, whereas a move for a better job might be viewed as less a

benefit to the child than a benefit to the parent.

All of these factors work together; no single factor decides the outcome. For example, if the parent who plans to move has always been the primary caregiver and the other parent would not be a good primary caregiver, the judge may approve the move even if the reasons for moving are not particularly strong. On the other hand, if the reason for moving is not a good one and the move would not be a net benefit for the child, and if the parent who is staying behind could do as good a job caring for the child, the judge might not permit the child to be relocated.

If the judge does not approve the relocation, the parent who wants to move can still move, but cannot take the child. Many parents will stay put rather than move without the child. If the parent has already moved, the judge cannot order the parent to move back, but can take custody away from that parent and give it to the other parent. Many parents will move back rather than lose custody.

The School Situation

Parents sometimes disagree about where the child should go to school. Often the disagreement boils down to which parent will have the child during the school week. Every July and August, many courts around the country set aside trial time specially to deal with “school cases” in which parents ask the courts to resolve disagreements about where children will start school in September.

These cases require the court to focus on the pluses and minuses of the school system, on how the child has been doing at the present school, and on each parent’s ability to support the child’s attendance and education.

The evidence courts consider in addressing disagreements about schooling includes:

- *Information about the child’s progress at the current school:* If a child has been doing well at the current school, the parent who is proposing a change usually must show that the child would benefit from the change. On the other hand, if a child is not doing well at the current school, then the court may be more receptive to a change. Thus, evidence of the child’s grades, participation in activities and sports, attendance record, disciplinary record (or lack of one) may help the judge assess how well the child is doing.

- *Each school’s curriculum, programs, facilities and services:* Particularly if

the child has special needs, or perhaps a special talent or skill, evidence that one school may do a better job than the other serving the child's needs and interests will be of value to the judge.

• *Each parent's level of involvement and support for the child's education:*
If one parent has been much more actively involved in homework, activities and other aspects of schooling than the other, the judge may decide it is in the child's best interests to entrust that parent with the responsibility of having the child during the school week.

Child Care Arrangements

If both parents work, child care issues may be important in the court's decision. Usually, the judge will focus on three factors in assessing child care arrangements: cost, convenience and suitability. Most states call for child care costs to be shared and factored into the amount of child support. Theoretically this gives both parents a financial incentive to control the cost of child care. If two day care providers are equally convenient in terms of their location and accessibility to both parents, and if both providers do an equally good job, usually the one that costs less will win out. Convenience is a factor when each parent will be picking up the child from day care; if one parent will be doing the greater share of pickups and drop-offs at day care, the court will look mostly at convenience for that parent. Suitability is sometimes a contested issue between parents. If a day care facility is lacking a required state permit or license, or if it presents risks to the child's health or safety, the judge may decide it is not in the child's best interests to attend that day care, and will approve the child's being placed elsewhere.

The evidence a judge might consider in deciding which parent's child care plan to approve includes the child care provider's fee schedule and brochures, a copy of the state or local licenses held by the facility, and photographs of the child care facility. You could also ask the child care provider to testify.

The Child's Own Preference or Wishes

In most courts, the judge must take into consideration the child's preferences regarding custody and visitation and other things, but only if the child has the ability to develop and express a meaningful preference. Information about what a child prefers and wants can be presented in several different ways.

In some states, the rules of evidence permit a parent or other witness

who has heard a child state a preference to testify to what the child said. In other courts, that information is “hearsay” and is not allowed.

Here are some of the ways to present information about a child’s preferences:

One way is when a parent testifies as to what the child has told the parent, but the judge often will not give such testimony much weight, knowing that children often tell their parents what they think the parents want to hear. Sometimes a guardian ad litem in the case can testify as to the child’s preference, based on the guardian’s interaction with the child.

Sometimes, teachers and other adults who know the child are allowed to testify as to what a child has said. Sometimes the parent or other witnesses will describe the way a child acts or appears (instead of what the child says), so as to shed light on what the child wants. If a witness testifies to observing that the child seems happier or more relaxed with one parent over the other, for example, that may indicate the child’s preference.

Calling the Child to Testify as a Witness

Don’t even think of making your child testify unless you have a very, very important reason to do so, meaning that you have no other way to prove a very important issue. If your child truly wants to speak to the judge, you, or your lawyer if you have one, should tell the judge, and the judge can decide how to handle it.

Sometimes a parent will call the child to testify as a witness. This is considered a last resort by most judges. It is often traumatic for the child to testify in open court, with both parents listening. If a parent insists on calling the child as a witness, the judge often will control the questioning, requiring all questions to be presented through the judge rather than directly by the parents or their lawyers. Some states allow the judge, with (or sometimes even without) the agreement of the parents, to speak with a child privately, off the record and outside the presence of the parents, so the child can speak openly and honestly without worrying that a parent will find out what is said.

Before any child can be called as a witness, the judge will determine whether the child has the ability to express herself and also understands the obligation of any witness to tell “the truth, the whole truth and nothing but the truth.” In most courts, children under six or seven years old are considered too young to give meaningful

testimony, and too young to understand every witness's obligation to tell the truth. Most courts consider a child ten or older qualified to be a witness.

Older children are more likely to wind up testifying in court than younger children. Sometimes children want to testify or at least they want speak to the judge who will be making decisions about them. If a child is old enough to have a point of view and to explain it, some judges are willing to listen.

One way for the court to get input from a child without having the child testify is to appoint a guardian ad litem (GAL) to interview the child and others, and pass the information on to the court in the form of a report or testimony. Even when there are no other issues calling for the appointment of a guardian ad litem, it may be in the child's best interests for a guardian to be appointed, to spare the child from having to testify.

Guardians ad litem

In some cases, the court appoints a guardian ad litem (GAL) to gather information and make recommendations about what is in the child's best interest.

The role of a GAL is simply to investigate the situation and then advocate for the child's best interests. GALs can investigate by interviewing children, parents, teachers and others, and gathering school and medical records and other information in a way that a judge cannot.

Guardians are usually appointed in a divorce or other family court case because one or both parents requests it by filing a motion for appointment of a GAL. Even when the parents don't ask, the judge can appoint a GAL for a child if the judge believes the child needs a GAL. Most judges encourage the parents in a case to agree on who should be appointed as a GAL. If the parties cannot agree, sometimes they give the judge a list of names and the judge selects from the list. Sometimes the judge selects a GAL whose skills are suited to the particular case.

GALs can be lawyers, social workers or people with experience in other areas. Some courts have requirements for GALs in terms of training and experience; other courts do not. Some courts require GALs to be appointed off a roster or list of GALs who have been approved for GAL work in the court.

Many GALs charge fees to the parties for their work; others may work as volunteers. If there is a fee, it may or may not be shared between the parties. If one party has a much greater ability to pay the GAL fee than the other, that party may be ordered to pay the entire fee. It is

common for court orders appointing a GAL to say that the GAL fee, however it is paid up front, can be reallocated at the end of the case. This means that if the judge decides one party has been uncooperative or for other reasons has created most of the need for the GAL to be appointed, that party can be made to pay the GAL's entire fee for the case.

Usually the court order appointing the GAL will spell out what the court wants the GAL to do. In a contested custody case, for example, the judge may ask the GAL to make a recommendation on custody and visitation. In a relocation case, the judge may ask the GAL to make a recommendation on whether the parent who wants to relocate should be allowed to take the child, and if so, what the visitation rights of the other parent should be.

The parties are expected to cooperate with the GAL during the GAL's investigation of the situation, including responding truthfully to questions and providing information and records accurately and promptly.

Once the GAL has finished the investigation, the GAL reports to the court. The report is usually in writing. A GAL may send a draft report to the parents and their lawyers for comment, before filing it with the court.

The GAL is supposed to make recommendations to the court and the parties based on the child's best interests. This may or may not mean that the GAL's recommendations are in line with what the child wants, because what the child wants may or may not be in the child's best interests. When a GAL is involved in a case, there usually is little or no need for a child to testify, as long as the GAL tells the court what the child's wishes are.

If the case goes to trial, the judge is not required to accept the GAL's recommendations, and can accept parts of the recommendation and not others. However, any judge is likely to give significant weight to GAL recommendations, if the GAL has acted in a neutral manner, has done an in-depth investigation of the situation, and has made thoughtful, well-documented and well-reasoned recommendations. Because judges often do follow GAL recommendations, contested custody cases are often settled based on the GAL's recommendations. If a custody case goes to trial, the GAL can testify and be questioned by the parties, just as any other witness. If the judge does, or does not, accept a GAL's recommendations, the decision can be appealed.

“Judge, My Child Doesn't Want to See His/Her Mother (Father)”

Family court judges know it is common for children whose parents are in the process of divorcing or separating to tell each parent what they think that parent wants to hear. It also is common for children in that

situation to say they prefer everything to be exactly equal between the parents: equal time with each parent; equal say for each parent. This may be because the child does not want to state a preference; the child does not want to be forced to choose between the two parents.

How do you find out your child's preference? One way is to ask the child, but don't put too much stock in what you hear. It's quite common for a child to tell each parent that the child wants to live with that parent and not the other parent. This can be a sign that the child is feeling pressured, caught in the middle, by the parents.

To find out if your child has a preference, a much better way than asking is to be a good listener and observer. Your child may even let you know without being asked.

Tit-For-Tat: Retaliatory Custody Motions

It is not unusual for parents to file motions to change custody, or to reduce or eliminate visitation, not because it is in the child's best interests, but to retaliate against the other parent. In one common scenario, if the custodial parent files a motion to increase child support after some years of no change, the other parent files a motion to transfer custody. In another, if the non-custodial parent files a motion to reduce child support because of a reduction in income, the custodial parent might file a motion to reduce or eliminate the non-custodial parent's visitation or parental rights.

If you are considering retaliating against the other parent in this fashion, we have three words of advice for you: *DON'T DO IT*.

Even if you had been considering filing a motion to change custody long before the other parent filed a motion, and even if you have a valid reason for doing so, the judge will likely view your motion as "upping the ante" in retaliation. This perception may affect your prospects of success.

One way to avoid being seen as filing a retaliatory motion is for you to work out an agreement on the other party's motion before or at the same time as you file your motion. For instance, you might agree to the other party's request to increase or reduce child support at least temporarily, on the understanding that you will be filing your own custody motion. What that can do is to signal to the court that your custody motion is serious and not retaliatory.

Sample Schedule A: A Typical Contact Schedule

This is a simple visitation schedule designed for a situation in which

one parent has the child most of the time, but the other parent has regular visitation on alternate weekends, during the week and at other designated times.

Unless agreed by the parties, the non-custodial parent is hereby awarded the following rights of contact with the child as a minimum, with additional time as agreed upon between the parents:

1. Alternate weekends—Every other weekend from 5:00 p.m. Friday to 6:00 p.m. Sunday.
2. Week-day visitation—Every Wednesday evening from the end of school (or school activities) until 7:00 p.m. In the event the non-custodial parent's work schedule is such that he or she has a weekday other than Wednesday off work, the weekday visitation may be scheduled on such day.
3. Holiday Designation—In odd-numbered years, Easter, July 4th, and in even-numbered years, Memorial Day and Labor Day. Visitation will commence at 5:00 p.m. on the day before each such holiday, and conclude at 7:00 p.m. on the day of the holiday.
4. Thanksgiving—In odd-numbered years, from 5:00 p.m. on the Wednesday before Thanksgiving until 7:00 p.m. on the Sunday after Thanksgiving.
5. Three-day Weekends—For holidays which are observed on a Friday or Monday, visitation shall include the weekend before or after such holiday observance. Holiday visitation which falls on a weekend will take precedence over the weekend schedule, so that a party may lose a regular weekend visitation to another party's holiday weekend.
6. Christmas—In odd-numbered years, for pre-school children from one week prior to Christmas Day, or for school age children from the time the school goes into recess for the Christmas holidays until 9:00 p.m. on Christmas Eve. In even-numbered years, from 9:00 p.m. on Christmas Eve and continue until 6:00 p.m. on the day prior to resumption of school, or for pre-school children one week after Christmas Day.
7. The father of the child(ren) will always have visitation the weekend of Father's Day, and the mother will have visitation the weekend of Mother's Day.
8. On the child(ren)'s birthday in odd-numbered years.
9. Summer visitation is fixed at six weeks, which may be divided into two three-week periods at the option of the non-custodial parent. Written notice as to the time and manner of visitation will be provided at least thirty (30) days in advance of the exercise of visitation. In the event the non-custodial parent chooses to exercise the summer visitation in one six-week period, at the end of the third week the custodial parent, at his or her expense, will have a two day visitation period, from 8:00 A.M. on the first day until 6:00 p.m. on

the second day. Vacations including the child(ren) which will continue more than three consecutive days will require notification to the other parent of the vacation destination, and if known, the telephone number where the child(ren) may be called in the event of an emergency only. Every effort will be made by the parties to coordinate their vacation schedules in order that the child(ren) will have the opportunity to spend vacation time with both parents.

10. Telephone communication—Both parties will provide current addresses and current telephone numbers at which the child(ren) may be reasonably accessed by mail and/or telephone at reasonable times.

11. The minimum visitation noted above will be in addition to all other reasonable visitation. In the event the non-custodial parent shall be unable to exercise a scheduled visitation, or will be late, he or she shall, as quickly as is practical, contact the custodial parent and advise as to the cancellation or length of delay. Unless otherwise provided by the court, the pickup and delivery of child(ren) for visitation will be the responsibility of the non-custodial parent or any competent adult designated for that purpose.

12. Visitation shall not, absent emergency conditions or situations, be independently suspended or terminated by either parent for any reason, including non-payment of child support. Any suspension or termination for emergency purposes will result in the immediate, written notification to the opposing party as to the reason for such termination.

13. Children shall not be permitted nor required to make decisions regarding visitation and the custodial parent is charged with the duty and responsibility to insure compliance with the visitation schedule.

14. Violation of the visitation order may result in a change in the custody of the child(ren), a limitation or termination of visitation, a finding of contempt of court, or such other action as the court deems appropriate.

Sample Schedule B: For When the Parents Live Far Apart

This is a visitation schedule designed for a situation in which one parent has the child most of the time, but the other parent has visitation during most of the child's vacation time.

Unless agreed by the parties, the non-custodial parent is hereby awarded the following rights of contact with the child as a minimum, with additional time as agreed upon between the parents:

1. Thanksgiving—In odd-numbered years, from 5:00 p.m. on the Wednesday before Thanksgiving until 7:00 p.m. on the Sunday after Thanksgiving.

2. Christmas—In odd-numbered years, for pre-school children from one week prior to Christmas Day, or for school age children from the time the school goes into recess for the Christmas holidays until 9:00

p.m. on Christmas Eve. In even-numbered years, from 9:00 p.m. on Christmas Eve and continue until 6:00 p.m. on the day prior to resumption of school, or for pre-school children one week after Christmas Day.

3. Whether or not the child is in school, the non-custodial parent will have the child during the entire winter and April vacation weeks during even years, and the April vacation week in odd years.

4. The non-custodial parent will have the child for the summer, beginning two weeks after the last day of school and ending two weeks before school begins.

Paragraphs 9 through 13 of Sample Schedule A can be included as appropriate.

Chapter 5

Working with Lawyers

(Or, Finding, Choosing, Hiring, Getting Along with,
and Parting Ways with Your Lawyer)

“What a holler would ensue if people had to pay the minister as much to marry them as they have to pay a lawyer to get them a divorce.”

— Claire Trevor

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his chapter covers everything about lawyers in divorce and other cases in family court—whether or not you need a lawyer; how to find a lawyer; how much having a lawyer may cost; how to keep costs down; how to choose a lawyer; how to work with your lawyer during the case; how to fire your lawyer, and what to do if your lawyer fires you.

Do I Need a Lawyer?

Do you need a lawyer? There is no one answer to this question. If your case is uncontested and involves no complicated financial, tax or property matters, you may not need a lawyer. If you are unsure, we recommend you consult with a lawyer to make sure you don't. In many other cases the answer is yes, you should have a lawyer if you can, but not necessarily for everything.

To decide whether you need a lawyer, you should know what a lawyer can do for you. There are two ways to use a lawyer in your family law case:

Soup to Nuts: First, you can have a lawyer represent you throughout the case. This is the most expensive approach, but if you anticipate a highly contested case involving significant assets and debts, complex property issues, or significant issues regarding children, you may have no alternative. On the other hand, if your case is uncontested or is contested as to less significant issues, and if you are unsure about being able to afford a lawyer, then you may not need “soup-to-nuts” legal representation.

A La Carte: Second, you can use a lawyer for some things and represent yourself at other times. This “pay as you go” approach

allows you to have a lawyer represent you in a contested matter while controlling the cost. For example, you can ask a lawyer to draft papers for you but still represent yourself when your case comes to court. Or, you can do the drafting and ask a lawyer to represent you only at the court hearing. More and more people in family court are using lawyers for some but not all purposes, as opposed to using them for everything or not using them at all. They save legal costs by doing what they can do themselves, but get the benefit of legal counsel when they need it. The concept of using lawyers selectively is sometimes known as “unbundled legal services.” Not all states authorize lawyers to appear in court for limited purposes, so you should check to make sure the option is available.

Which Approach Is Best: Many people assume that having a lawyer is an all-or-nothing proposition, meaning you either adopt the “soup to nuts” approach or you go without a lawyer. The “a la carte” approach is an increasingly popular way for people to use lawyers when they need them and not otherwise. Different state courts have different rules. Your state or local bar association, or the court clerk’s office, should be able to provide further information.

Collaborative Lawyering

There is a new movement growing in the legal community which you and your partner may also wish to consider. It is called collaborative lawyering, and it goes hand-in-hand with the *collaborative divorce* movement.

Here is how collaborative divorce and collaborative lawyering work. The spouses who are divorcing agree up front to make every effort to work out the issues in their divorce themselves, without asking the court to decide disputes. Often the agreement is documented in a *collaborative divorce agreement*. Each spouse hires a lawyer, but the lawyers are also committed to “collaborative lawyering,” meaning that the lawyers take a problem-solving approach aimed at resolving the issues in the divorce outside court. Each party signs a contract with their lawyer (known as a “*retainer agreement*”) in which the client and the lawyer agree that their relationship will end if the case becomes contested, and has to go to a court hearing for resolution. This means that both parties will have to hire (and pay for) new lawyers if their case becomes contested in court. In theory and often in practice, this arrangement motivates parties and lawyers to reach agreement outside court.

One of the arguments for collaborativedivorce and collaborative lawyering is that they give parties and lawyers the same financial incentive to reach a relatively quick and uncontested resolution of the case. The lawyers know their services will terminate if the

negotiations break down, so they are motivated to be problem-solvers as opposed to problem-generators. The parties know they will have to hire new lawyers if negotiations break down, so they are motivated to reach agreement. In conventional divorce, the same argument says, the lawyers earn more if the divorce is contested and prolonged, so the financial incentive for the lawyer is to prolong and inflame the disagreements, at the expense of the client.

Collaborative lawyering and collaborative divorce work best when both parties are committing to working out their differences without a court battle, but want the benefit of a lawyer's help in negotiating the terms of a fair agreement.

Collaborative lawyering is a relatively new trend, and there may or may not be lawyers in your area who are willing to work under the collaborative lawyering model. Here are some web references you can use if you wish to explore this option.

<http://www.collaborativepractice.com/>

The International Academy of Collaborative Professionals is a group of lawyers, mediators, mental health providers and financial advisers who focus on collaborative divorce and similar dispute resolution methods. It includes a search engine for finding professionals in various locations.

<http://www.divorcenet.com/>

This is one of the largest divorce websites, and it includes resources on using collaborative divorce and on finding an attorney who uses collaborative methods.

Can I Afford a Lawyer?

Keep in mind you may not need to pay all or even any of the cost of having a lawyer. If the other party's financial resources are substantially greater than yours, you may be able to convince your family court to require the other party to pay your legal fees. Most, if not all, family courts have the power to make one party pay the other's legal fees, starting at or near the beginning of the court case, to assure a "level playing field." Especially when children are involved, but even when they are not, good public policy calls for family court disputes to be resolved fairly, without either party having an unfair economic advantage over the other.

Whether or not you think you need a lawyer or can afford to hire one, you can probably afford what we call a "reality check."

We suggest that almost everyone, whether or not they plan to hire a lawyer to handle their case, at least arrange for a "reality check." By this we mean a consultation that can cost less than \$100–200,

depending on how much preparation you do before the session, how long the session takes, and how much the lawyer charges. Based on the results of the reality check, you will be in a better position to decide whether you need a lawyer, whether you can afford one, and whether you may be able to get the other party to pay your legal fees.

The “Reality Check”

Even if you do not plan to hire a lawyer or are undecided, if at all possible you still should get a “reality check.” Almost everyone embarking on a divorce case or any other kind of family law case should at least consult with a lawyer if at all possible, for a reality check early in the process. A “reality check” with a lawyer enables you, first, to know where you and the other party stand in terms of your legal rights; second, to find out if your expectations are realistic; and third, and to decide whether you need a lawyer for everything, for some things, or for nothing at all.

Reality checks are most valuable early in the life of your family law case. If you wait to the last minute (just before the trial in your case, for example), it may be too late to get much benefit from using a lawyer, and lawyers may be reluctant to get involved.

Here is a list of the reasons why anyone who is at the beginning or in the middle of a divorce owes it to themselves (and any children involved) to sit down with a lawyer for a reality check, and to encourage your spouse or partner to do the same. The more of these that you think apply to you and your situation, the more important it is for you to talk to a lawyer:

- You owe it yourself to know what your rights are; you may decide not to exercise your rights, but you should know (and it may be helpful for the other party to know) that you are giving them up.
- You need to be fair and realistic about your situation and your expectations.
- Your spouse or partner needs to be fair and realistic about the situation and expectations.
- Divorce and separation can be so emotionally upsetting that the people involved cannot, without help, be fair to each other and realistic about the situation.
- The emotions will eventually go away, but the decisions made in divorce can affect you and your family for the rest of your lives.
- A divorce settlement based on reality is more likely to last than one based on emotion.
- An agreed-on divorce settlement is more likely to last than one made by court order after a trial.
- You and your spouse have nothing to lose and much to gain because if both spouses are realistic, they are much more likely to resolve

things by agreement and to feel good about it in hindsight five or ten years later.

After the reality check, you can decide whether you need to turn over your case to a lawyer.

The best and most meaningful reality checks will take at least an hour or two of a lawyer's time, and you normally will be expected to pay for that. Some people embarking on divorce try to get legal advice for free, by means of the "free consultations" that many family court lawyers offer. You can certainly try that approach, but you should also recognize that it will likely not give you what you need.

The "free consultation" that some lawyers advertise is sometimes worth about as much as it costs in terms of usable advice. Free consultations usually last no more than half an hour, which is not enough time for any lawyer to do more than a cursory assessment of the situation. The real value in the free consultations is to give you a sense of the lawyer, and to help you decide if you can work with the lawyer. A better approach is to find a good lawyer and buy an hour or two of the lawyer's time to go over what you need to find out. Then you can decide whether you need a lawyer for the long term.

How much will it cost?

How much a lawyer will cost usually depends on three factors: what you are asking your lawyer to do; what you have agreed to pay; and how much time it will take your lawyer to do the job.

The least expensive method is to consult with the lawyer on specific questions or issues, as opposed to hiring the lawyer to represent you on everything having to do with your divorce.

If you are asking your lawyer to handle the entire divorce, it will be more expensive. However, if the divorce is uncontested, you may be able to retain a lawyer for a few hundred dollars, to file the case for you, prepare the divorce judgment, and appear in court with you on the day of the divorce hearing. This type of flat fee or fixed fee is usually available only when the divorce is uncontested. Flat-fee uncontested divorces can run from a few hundred dollars to more than a few thousand dollars—depending on where you live, the kind of lawyer or law firm you choose, whether children, real estate and retirement accounts are involved, and how complicated your finances are. If you are considering a flat-rate arrangement, find out exactly what services are covered. Find out also how additional services are billed. Usually it will be on an hourly rate basis.

In many states, a contingent fee or percentage fee is not permitted in

divorce or other family law cases. Most divorce lawyers work most of the time on an hourly rate basis. Hourly rates range from about \$50 to over \$500. To get a feel for what rates are in your area, you can contact several lawyers and ask what they charge per hour. The local or state bar association may have information on typical rates for divorce cases. Friends or relatives who have used divorce lawyers may also have information.

Hourly rates vary widely depending on such factors as:

- *The part of the country:* Fees tend to be higher in the eastern and far western parts of the country than in the middle and southern parts.
- *The size of the city where the lawyer practices:* Fees tend to be higher in the larger cities than in small towns or rural areas.
- *The experience level of the lawyer:* Fees tend to rise with experience.
- *The size of the lawyer's law firm:* Very large firms tend to charge more per hour for a lawyer's time than sole practitioners or small firms do.
- *The level of expertise and specialization of the lawyer:* The best-known divorce lawyers tend to charge hundreds of dollars an hour.
- *The level of competition among lawyers for business:* Where there is a glut of lawyers, competition for cases can result in low hourly rates or competitive flat-rates.
- *The lawyer's interest (or lack of interest) in your case or in new cases generally:* If the lawyer is hungry for business, the fee may be discounted.
- *The lawyer's assessment of you:* If a lawyer believes you are likely to be a "difficult client," then the lawyer may quote a higher hourly rate, or ask for a larger initial retainer.

What if I cannot afford a lawyer?

Don't give up without trying. Remember, as we said earlier in this chapter, if the other party has significantly more financial resources than you do, you may be able to get your family court to make the other party pay your legal fees. Even if this is not an option, in nearly all states, legal services organizations are available, either to provide lawyers to low-income people or to put low-income people in touch with lawyers willing to take cases for a low or no fee.

However, these organizations can't help everyone; they have limited staff. You might have a good case, but still not fall into one of their

priority areas for representation.

To contact the legal services organization in your area, ask your family court clerk or use the following web link: <http://www.lsc.gov/map/index.php>.

If you have exhausted every means of finding a lawyer, you still should not lose hope. We have written this book especially for people who need to represent themselves in court. Remember, we can not and are not giving legal advice in your specific case, but we hope our suggestions and ideas will be helpful to all those trying to navigate family court on their own.

Steps for Getting a Lawyer

Step 1: Getting Names of Lawyers:

Particularly if the other party has started a court case, but even if you are the moving party in the case, you may feel in a rush to find a lawyer to help you. Be sure to pay attention to any deadlines the court has set, but try to resist the impulse to hire the first available lawyer. If necessary, ask for a postponement (or “continuance,” to use the legal term) of any court date or deadline for responding to the other party’s court papers. If the court knows you need a continuance to find legal counsel, your request for a reasonable postponement (one or two weeks) of the deadline is likely to be granted.

How many names of lawyers you come up with depends on how much time you have and how much you expect to rely on your lawyer. If you expect your family case to be highly contested or complicated, take the time to come up with three, preferably five, names of lawyers who would be capable and qualified, and then contact them.

It is very easy to find lawyers. They advertise on television, online and under “Lawyers” in the Yellow Pages. What is trickier is how to find out which of those lawyers you should contact. The great majority of lawyers are both ethical and competent, but some lawyers fall short in one or both respects. Your first step should be to develop, with care, a list of lawyers to contact.

Here are some suggestions on how to your list of lawyers:

- Ask any lawyers whom you know. Lawyers in the same area often have a good sense of which of their colleagues are effective in the area of family law.
- Bar associations often will provide lists of lawyers with expertise in specific areas. However, these lists should not be taken as an

endorsement—usually the listed lawyers have asked or agreed to be listed.

- Word of mouth is often a good resource. Divorced friends, relatives and neighbors may have suggestions about lawyers. Make sure that you actually speak to the person who actually hired and worked with the lawyer. Don't rely on second-hand information. Ask if they would hire the lawyer again. Ask about how fees were charged, how responsive the lawyer was, and how the client feels overall about the divorce case. However, evaluate carefully what you hear, especially negative comments. Many people who go through contested divorces blame their lawyers for bad outcomes that were in fact the result of the clients' own decisions.
- Court clerks may be good sources of lawyer names, although they may not be allowed or inclined to recommend specific lawyers. However, you have nothing to lose by asking a clerk who handles family cases to suggest the names of a few lawyers to call.
- Be cautious about hiring a lawyer based on advertising. In our experience, the better lawyers usually don't need to advertise, and many lawyers simply choose not to. Some lawyers advertise because they have trouble attracting clients on the basis of their skill and reputation. This doesn't mean you should avoid lawyers who advertise, but your decision to hire the lawyer should definitely be based on more than the advertising.

Step Two: Interviewing a Lawyer

Your next step is to contact the lawyers you are considering to set up an appointment. Often this is done by telephoning each lawyer's office but some lawyers use e-mail.

When you set up your first appointment with a lawyer, make sure you understand the terms on which the lawyer will be meeting with you. Many lawyers advertise "free consultations," and even those that don't specifically advertise them often offer them. There should be no charge for this first appointment, but you may want to confirm that fact when you schedule the appointment. You also should keep in mind that if there is no charge, the length of the interview will be limited, likely to around a half hour to an hour. Time is a lawyer's stock in trade, and a lawyer who grants long interviews without charge will be hard pressed to survive.

If a lawyer is unwilling to provide a "free consultation," that is not

necessarily a bad thing. Lawyers who specialize in family law cases may be unwilling to give you a free consultation. Manipulative litigants sometimes set up free consultations with a lawyer they have no intention of hiring, as a ploy to create a “conflict of interest” for that lawyer, thereby preventing the other party from employing that attorney. This is less likely to happen if the lawyer charges a fee for the initial interview.

Think of this first appointment as a job interview. You are interviewing the lawyer, and the lawyer is interviewing you. You want to have a good lawyer, and the lawyer wants to have a good client. Prepare for the interview in two ways. First, develop a list of questions to ask. Second, compile the information you want to convey and that a lawyer is likely to ask for. See the following checklist for both parts of the preparation. Bear in mind the initial interview may last no longer than a half hour, so you will likely not be able to discuss everything on both checklists.

Checklist of Things to Bring and Things to Discuss at the Initial Interview

- Bring with you any court papers you have received from the opposing party or the court.
- Bring any correspondence about the case from the other party or the other party’s lawyer.
- Bring any agreement you and the other party has signed. If there is an agreement but not in writing, be prepared to summarize it.
- Make a list of the major assets (including bank accounts, vehicles, retirement accounts, pension plans, real estate, stock portfolios, etc.) owned by you and/or the other party. Include assets owned separately by you or by the other party and jointly owned assets.
- Make a list of the major debts owed by you and/or the other party. Just as with assets, include both jointly owed debts and debts owed separately by you or the other party.
- Bring a copy of your and the other party’s tax returns for the past two years.
- Be prepared to explain your and the other party’s sources of income, and bring current pay stubs if available.
- Write out the questions you have.
- Think through in advance, and be prepared to discuss, what you are looking for out of the process.
- Be prepared to explain the other party’s viewpoint as well, and to identify those issues that may be agreed-on and those that may be contested.
- Be prepared to discuss what level of involvement you have in mind for the lawyer—handling the whole case; helping you behind the

scenes while you represent yourself in court or handling only court appearances.

- Be prepared to explain your overall perspective on the case—do you want to avoid a court battle at almost any cost or are you ready to fight for your rights? Or are you looking for what is fair and willing to do what it takes to get it? In terms of a lawyer, are you looking for a negotiator or a warrior, or someone who can serve as either when the occasion arises?

Questions for the Lawyer in an Initial Interview:

- How much experience does the lawyer have in handling family court cases? Lack of experience is not necessarily a disqualification; less experienced lawyers tend to charge less than more experienced lawyers, and may be able to devote more attention to the case.

- What percentage of the lawyer's time is spent on family law cases? If the lawyer does not focus exclusively on family law, look for a lawyer who regularly handles such cases.

- How does the lawyer charge for services and what are the rates? Some lawyers charge a flat fee; some charge by the hour. Some charge a combination of flat fee and hourly rate. Whether flat or hourly, legal fees vary greatly around the country and even within a community. Is the hourly rate billed by the quarter-hour or tenth of an hour? Don't hesitate to ask the lawyer to put estimates on the cost of different tasks or phases of the case. If requested, lawyers may also put a cap or ceiling on charges, although these caps usually build in an ample cushion to protect the lawyer if the work turns out to take longer than anticipated.

- Will the lawyer require a retainer, and if so, how much? When a lawyer charges by the hour, a retainer is like a down payment and the lawyer bills against the retainer. Is the retainer refundable, and if so, under what circumstances?

- Is the lawyer prepared to limit her or his time to specific issues or tasks?

- Can you save any legal fees by handling some tasks yourself?

- How much of the work would the lawyer do personally, and how much would be assigned to an associate lawyer? To a paralegal? To clerical staff? You should have a clear understanding about the extent to which the lawyer will be personally involved in handling your case. Note that there are significant cost savings and other benefits associated with having some tasks performed by paralegals and other non-lawyer personnel.

- Should contact between you and the lawyer be by telephone or e-mail? Communication or the lack thereof, is a very common source of problems between lawyers and clients. Some understandings on how things will work between you and your lawyer are important. On the

other hand, don't harp on communication to the point that the lawyer starts to worry that you will be a pest if she takes your case. Note that this list thus far does not include requesting references. For understandable reasons, people involved in family court cases may not want their lawyers listing them as references. There is certainly no harm in asking for references. Some lawyers will oblige, and others will not.

Don't be surprised if during these interviews the lawyers try to sell you on using their services. After all, family court lawyers are in the business of sales—whether the case goes to court or is settled, they sell their clients' positions to judges and opposing counsel. However, beware of the lawyer who makes a sweeping guarantee of success during the initial meeting. No lawyer can possibly predict the outcome of a family law case without a firm understanding of their own client's position and evidence and also the other side's position and evidence. Lawyers who promise the moon up front are similar to real estate agents who quote inflated prices to get the seller to sign an exclusive listing contract. Because family court can be unpredictable, responsible lawyers are wary of making broad promises and guarantees to potential clients. Knowledgeable clients don't expect lawyers to give firm predictions on the outcome of a case based on an initial interview.

What a lawyer can do during the initial conference is to explain how the law operates in situations like yours, and perhaps give you some idea of whether your expectations are realistic or not.

The initial interview can be most valuable in helping you decide whether the lawyer will be a good fit with you and your situation. Expect the interview to last no more than a half hour to an hour, so make sure there is time for you to cover your questions.

Step 3: Choosing a Lawyer

At some point you will need to choose a lawyer. The more you expect to depend on your lawyer, the more carefully you need to choose. The three important qualities are competence, trustworthiness and likeability. Of these qualities, the first two are more important than the third. If your lawyer is likeable, so much the better, but it is more important that your lawyer be a good lawyer than a likeable lawyer.

Likewise, whether your lawyer is part of a large firm or a sole practitioner with no secretary is a consideration. The larger the firm, the more expensive its lawyers are likely to be. Lawyers with little or

no overhead tend to be less expensive, but they may also be harder to get in touch with.

Whether your lawyer specializes in family law should also be a consideration, but don't automatically rank specialists higher than lawyers with a more diverse practice. Lawyers who specialize in family law often belong to professional organizations that focus on different aspects of family law. For example, leading family law attorneys may belong to the American Academy of Matrimonial Lawyers, although there are many highly skilled family law practitioners who have not joined the Academy. Sometimes, a lawyer's professional affiliations furnish a clue to the lawyer's style and approach. The Association of Family and Conciliation Courts (AFCC) has as its mission to promote collaborative resolution of family law cases, and lawyers who belong to the AFCC may be oriented to problem-solving the disagreements in a case in a collaborative way without a lengthy court battle.

Here are some considerations to help guide you in making a decision:

- **Choose a lawyer who is able to win your trust and confidence.** Other lawyers, judges, and the other party are likely to respond to your lawyer in the same way you do.
- **Choose a lawyer you can relate to.** This doesn't mean going with the most likeable prospect, but it is important that you and your lawyer have enough of a connection to understand each other.
- **Choose a lawyer whose skills are a match for the objectives you have and the tactics you wish to employ.** If your goal is to get more than what is fair, and you are willing to use legal warfare against your spouse, then find yourself a lawyer who is a bulldog or a shark (see our guide to these species in Chapter 9), and be prepared to pay dearly. Our experience in handling family law cases suggests that you are likely to eventually regret your choice of goal, tactics and lawyer. On the other hand, if your goal is a fair and lasting resolution of your case, and your choice of tactics is an approach that minimizes long-term harm to yourself, your family and your relationships, then you want a lawyer whose skills and inclinations will help you realize that goal.
- **Choose a lawyer you can afford.** If you make an agreement regarding payment of legal fees and don't keep it, your lawyer will likely be allowed to terminate the representation, and you will have no lawyer and no refund of what you have already paid.

- **Choose a lawyer who is responsive.** One of the most frequent client- complaints about lawyers is unresponsiveness. How the lawyer handles your initial contact can be a good guide to how responsive the lawyer will be during your case. If your initial telephone call was returned promptly, that's a good sign. If you were scheduled promptly for an appointment, that, too, can be a good sign.
- **Choose a lawyer who is ethical.** In most states, lawyers are regulated by a state board or similar body, usually located in the state capital. Oftentimes, you can find out if a lawyer has a record of disciplinary violations.
- **Choose a lawyer who will tell you how it is, rather than what you want to hear.** Don't necessarily hire the lawyer who gives you the most favorable assessment of your chances. A lawyer's role as adviser and counselor is at least as important as a lawyer's role as courtroom advocate. Your lawyer needs to be able to give, and you need to be able to accept, a balanced assessment of the strengths and weaknesses of the case.

Step 4: Hiring a Lawyer

Once you have chosen a lawyer, you and the lawyer need to come to an agreement or contract by which you retain the lawyer's services. These are often called "retainer agreements." Preferably your agreement will be put in writing after you have discussed it. Some states require retainer agreements to be in writing. Even in states that don't, many lawyers put the agreement in writing, in the form of a letter to the client, which, once the client countersigns, is a binding contract. These letters are often called "engagement letters" or "retention letters." If your lawyer doesn't voluntarily send you an agreement or letter outlining the terms of representation, ask for it.

The discussion you have with the lawyer you have selected should cover the following areas:

- **What is the scope of representation?** The services provided by the lawyer could be limited to the "reality check" that we discussed earlier, or could extend to all legal services required in your family case. A middle ground between these extremes could be an agreement that the services provided by the attorney consist of specified tasks, or they could extend to tasks to be specified by you as the case progresses.
- **Who will be doing what?** Will the lawyer handle all court

appearances personally or might some be assigned to junior attorneys at the same law firm? Will the lawyer be delegating tasks to paralegals or others? Will an investigator be used for tasks such as locating or interviewing witnesses, and if so, for what? Use of paralegals, investigators and clerical staff that cost less than lawyers can be a way of reducing legal expenses. What are you expected to do in terms of gathering information or documents? Will you be handling any of the work that a lawyer could or would perform, as a means of reducing the cost?

• **Is the divorce lawyer expected to perform any tasks beyond representing your interests in the divorce action?** This question can be complex in particular situations. For example, when the assets of either spouse include a business, the divorce lawyer may be expected to handle any stock transfers, sale of assets or other transactions that may stem from the divorce. A more common situation involves a lawyer preparing a deed transferring a residence from joint ownership to ownership by one of the parties in a divorce.

• **How will you be charged and how is payment to be made?** There needs to be a clear understanding about how your lawyer will charge for services and also how expenses are charged. Some lawyers charge for such expenses as postage, photocopies and computerized legal research; others don't. Terms of payment also need to be resolved. Sometimes a client makes a down payment, often called a retainer, and then is billed monthly after the retainer is used up. Sometimes, attorneys agree to work on a lump sum basis, especially in uncontested cases, with payment made up front, or at designated stages of the case. Sometimes the retainer is refundable in part if you change your mind, and sometimes it is not. Work out these details beforehand.

Once the terms of representation are established by means of discussion, the terms should be documented in the retainer agreement or engagement letter. Usually the lawyer prepares the agreement or letter and forwards it in duplicate to the client for review and signature. An engagement letter commonly describes what services the lawyer will provide. It should also state what the services provided will cost, whether based on an hourly rate or a flat fee. If paralegals or other non-lawyers will be working on the case, the engagement letter should specify what the cost for their work will be. If you are paying an initial retainer amount, the engagement letter should state the amount and also spell out whether the retainer is refundable, and under what circumstances.

Other terms are often included in a written attorney-client agreement, such as how disputes will be resolved, and the terms under which the lawyer's representation can be terminated by either party.

Getting Along With Your Lawyer

Once you have a lawyer, good communication is the key to getting along with your lawyer. Good communication begins with knowing when to communicate and when not to communicate. Your communication with your lawyer should fall between the extremes of being AWOL and being a pest. There should be an understanding up front about your and your lawyer's expectations in terms of how often communication will take place, and by what means it should take place.

Some lawyers prefer to use the telephone for client communications; others prefer e-mail. Some lawyers prefer to be contacted directly; others prefer contact to be through their administrative assistants. During your early discussions with your lawyer, clarify your lawyer's preferences in terms of how and with whom contact should be made.

Your lawyer should tell you of major developments in the case, such as any decision by the court or any communication of substance from the opposing party. Likewise, you need to advise the lawyer of any significant change in your situation, such as a change in your address or your job, and any change involving the other party that could affect the lawyer's handling of the case. You also should let your lawyer know of any change in your position or goals. For example, if you and the other party, through conversations without lawyers, reach an agreement that eliminates one or more of the issues in the case, let your lawyer know as soon as possible.

Don't be surprised if weeks pass without any contact from your lawyer. The court process in many states is exceedingly slow—it is not uncommon for parties in a contested divorce case to wait many months, even years, for the trial to be scheduled. On the other hand, if there is ongoing activity in your case, you may need to be in touch with your lawyer on a weekly or even more frequent basis.

Use good judgment in contacting your lawyer.

How to be a good client

Listen to your lawyer. Before you develop a position, get your lawyer's advice about whether you are being realistic and whether your goals are attainable. Remember, your lawyer's job is not only to be an

advocate for your interests and viewpoint in negotiations and in the courtroom, but also to be a counselor regarding what is achievable and how best to achieve it. If your lawyer tells you something you don't want to hear, keep listening. Remember, a lawyer who is just a yes-man or yes-woman is not doing his or her job as a counselor.

Be clear on what you are looking for. Setting goals is one of the biggest challenges for parties and lawyers alike in family law cases. As the client, it is both your right and your duty to set goals for the case. It is your right because the case is yours, and it is for you to decide what you hope to achieve. It is your duty because your lawyer, the court, and the other party have a right to know what you are trying to accomplish. Setting goals is not a one-time event at the beginning of the case. Instead, it is an evolving process that begins as soon as the case continues, with adjustments made as the result of new information or unforeseen changes, until the very end of the case. A good lawyer will take the time necessary to talk over your concerns and help you develop reasonable goals.

Be consistent in what you are looking for. Once you have decided what you are looking for, stick with it unless you have good reason to change. Your lawyer will be presenting your position to the other party and to the court at various times throughout the case, based on the authority and direction you give. You lose credibility if you change your mind without good reason, and you may lose your lawyer. Good lawyers sometimes fire a client because that client has gone back on what the client has authorized the lawyer to present to the other party or to the court. Good lawyers know that their reputations with judges and other lawyers are worth too much to sacrifice at the behest of any client. So if you give your lawyer direction on what to present to the court or to the other party, don't go back on your direction without discussing the ramifications with your lawyer. This does not mean you should never change your point of view; in fact, you should always be receptive to re-evaluating your position and your assumptions. Cases settle because people change their positions and goals through negotiations. However, don't change your positions or goals without consulting with your lawyer.

Stay in touch with your lawyer no less and no more often than necessary. Make sure your lawyer always has a current address, phone number and e-mail address. Your lawyer should keep you apprised of developments. If you have heard nothing from your lawyer about the case for a period of more than a month or so, contact your lawyer for an update on what, if anything is happening. On the other hand, don't be a pest of a client by contacting your lawyer when you have nothing

to discuss. Don't use your lawyer as a therapist. Don't contact your lawyer every day or even every week unless you have a particular reason for doing so or unless the lawyer has asked you to stay in touch that frequently.

If problems come up, be forthright in dealing with them. For example, if you have difficulty keeping an agreement regarding the payment of legal fees, instead of ignoring the problem or hoping the lawyer won't notice, get in touch with the lawyer or the lawyer's bookkeeper and explain your situation. Explain also what you are prepared to pay on an interim basis until your financial standing improves. Many lawyers are willing to make payment arrangements or otherwise accommodate a client's financial needs, if the client communicates forthrightly about the situation. On the other hand, if you don't communicate with your lawyer, you leave the lawyer with little choice but to terminate the relationship for non-payment of fees, or to ask the court to allow your lawyer to withdraw from your case.

A Deal is a Deal is a Deal

The divorce case was scheduled for trial, but the husband and wife, with the help of their lawyers, agreed at the last minute on a settlement that would make the trial unnecessary.

Usually when this happens the parties and lawyers put the terms of settlement on the record with the court. The lawyers present the terms of settlement to the judge, with a court reporter or an electronic recording machine taking down everything said. The parties confirm that they agree with what had been presented, and the judge approves the settlement.

However, this case did not follow that script because the husband—the plaintiff in the case—had changed his mind about the settlement. When I came into the courtroom, the husband's lawyer asked for a continuance—a postponement. He said he had not prepared for trial because he had assumed his client would follow through with the agreement. However, the wife and her attorney said they were still ready for trial if the settlement was going to fall through.

The glitch could have been the husband's fault—a simple last-minute change of mind—or it could have been his lawyer's fault—failing to explain something clearly or completely. Either way, it was their problem and they could sort it out later between themselves. I said the trial would not be postponed, and that the husband as plaintiff could call his first witness. The husband then asked for an opportunity to speak to his lawyer. I agreed and left the courtroom briefly. A few minutes later, the case settled as originally agreed.

The moral of the story: Don't make agreements unless you are prepared to stand by them.

Resolving Disagreements with Your Lawyer

This section offers suggestions for handling different kinds of disagreements with your lawyer.

Disagreements come in all kinds. Some are about the fees billed by the lawyer; some are about the advice and recommendations the lawyer is offering; some reflect failures in communication (such as the lawyer not returning calls, or the client not staying in touch with the lawyer). Often, the best way to resolve a disagreement is to talk it through. Sometimes what seemed to be a disagreement as to strategy or approach turns out not to be once the discussion takes place.

Sometimes issues arise between a client and a lawyer that cannot be resolved through discussion. Sometimes a lawyer and a client have to part ways. If the lawyer becomes ill or retires, does something unethical, has a conflict of interest that cannot be resolved, or is appointed to be a judge, discussion is not a solution and the lawyer-client relationship must come to an end. The next section covers how to end the relationship.

You always have the right to discharge your attorney. On the other hand, just because you have the right to discharge your lawyer does not mean you should. Keep in mind also that your lawyer has the right to resign from your case, although sometimes a court will not allow a lawyer to exit (or “withdraw”) from a pending case unless another lawyer simultaneously enters the case, so that the case is not delayed or prevented from being called to trial.

Switching lawyers usually entails additional expense and delay. All things being equal, the client who switches lawyers during a court case will pay more than the client who has the same lawyer throughout the case. Changing lawyers often delays the progress of the case toward trial or settlement while the new lawyer is learning the history of the case and the people and issues involved.

If you know you need to change attorneys, don’t wait until the last minute to act. Because of the potential for delay when one lawyer takes over for another, a court sometimes will not permit a lawyer to resign just before a scheduled trial, or will allow the lawyer to exit from the case only on condition that the case will still go to trial as scheduled, whether or not a new lawyer has taken over.

Because of the disruptive consequences of switching lawyers, if there

is any way of working out the issue, make the effort before parting company with your lawyer. Most of the problems between lawyers and clients fall into two categories: fee-related issues, and issues of communications.

Fee-Related Disputes

Fee-related issues in turn fall into two categories. One involves situations in which the client does not or cannot pay the lawyer's fees as required by the agreement under which the lawyer took the case. The other category involves situations in which the client disputes the amount billed in legal fees.

- *If You Cannot Pay As Agreed:* If you fall behind payments under a fee agreement, your first step should be to pay what you reasonably can. If your lawyer sees you making the effort to pay something, even if it is substantially less than what is due, the lawyer may be more willing to continue the representation on a “pay what you can” basis than if you pay nothing. You and your lawyer might also renegotiate your agreement to reflect a reduced level of service in exchange for a reduced level of payment. For example, if your lawyer has been representing you on a “soup to nuts” basis, you and your lawyer could agree to change your arrangement to what we call the “a la carte” (or unbundled) basis, under which you pay as you go for legal services you specifically request, and also pay something toward past due fees.

On the other hand, keep in mind that if your lawyer is unwilling to continue the representation, you will need funds to retain and pay another lawyer unless you propose to represent yourself. If your lawyer is unwilling to commit to continued representation on either a “pay what you can” basis or on the basis of a reduced but specific monthly or weekly payment toward outstanding legal fees, you will need to consider whether to seek other representation.

- *If You Disagree About Fees:* The other type of fee issue involves an actual disagreement about fees. Again, these come in different kinds. If the client is paying the lawyer by the hour, the issue may be that the lawyer is putting in too much time or not working efficiently. If the client is paying a flat fee, the issue may be about what is, and is not, covered by that fee. Either way, because the lawyer is charging the fee, the burden is on the lawyer to justify it. The burden is also on the lawyer to document the fee arrangement so as to avoid misunderstanding.

Every client should understand that there are scenarios under which

unexpected fees can be justified. Often fees turn out higher than estimated because the case turns out to be more complicated or more contentious than expected. One example is that the real estate turns out to have title problems that need to be resolved before the divorce can become final. Another is that the other party embraces a “scorched earth” strategy under which nothing is handled by agreement and everything is a battle. On the other hand, part of the lawyer’s job is to prepare the client for the unexpected and to define what is, and is not, covered by a flat fee, so the mere fact that the fee is attributable to the unusual or unexpected does not necessarily mean it is fair for you to pay it.

Upfront communication often heads off disagreements about legal fees. If a problem surfaces, communication after the fact is better than no communication, so ask your lawyer for the opportunity to have a discussion in person, off the meter. Explain to the lawyer that you intend to be reasonable and open-minded, but you have to question the bill. Rather than going on the attack, phrase your comments in terms of yourself, what you understood, what you expected, how you feel, what you think.

If discussion does not resolve the difficulty, ask the lawyer to suggest a fair and easy way to resolve the problem so the two of you can move on. Mediation is a possibility, and some states have a fee arbitration process that a client can invoke when they think they are being overcharged by a lawyer. Most lawyers don’t relish the idea of suing their own former clients over fees, so the lawyer may well be willing to consider some form of ADR (alternate dispute resolution) such as mediation, instead of taking you to court. Some consumer groups or state consumer protection authorities offer a mediation service.

Ultimately, if a fee dispute is not resolved somehow, the ordinary scenario is for the lawyer to resign, and, sometimes, to sue the client for the fee.

Communication Disputes

The other common type of dispute between lawyers and clients is over communication. The lawyer does not return the client’s telephone calls, or vice-versa. The client does not understand the lawyer’s explanation, or does not believe the lawyer understands the client’s concerns. The client does not think the lawyer “believes in my cause.”

Whatever the problem is, barring a breach of trust or other unforgivable act, it usually can be fixed if lawyer and client have a

reasonable airing of views. If you have a gripe about your lawyer, it is almost never productive to start on the attack, because an attack puts anyone on the defensive. Instead, simply tell about your experience and how it makes you feel. To illustrate, don't lead off with, "Why aren't you returning my telephone calls?" Try this: "I called your office five days in a row to give you the information you asked for and I never heard back; it makes me feel as if my case is at the bottom of the priority list." The lawyer may have a perfectly reasonable explanation for the behavior: "I have been in a trial for the last five days." If the lawyer does not respond to your satisfaction, then it may be appropriate to turn up the heat.

Why is My Lawyer Friendly with the Other Side's Lawyer?

Clients rightly expect their lawyers to do battle in the courtroom, but some clients think their lawyers should treat the other party and the other party's lawyer like enemies all the time.

If your lawyer is friendly with the other party's lawyer, does that mean your lawyer isn't on your side? If your lawyer doesn't share your negative view of the other party's lawyer, does that mean your lawyer doesn't believe in your case? The answer to both questions: Not at all.

In fact, if your lawyer gets personally involved in the issues between you and the other party, your lawyer may have trouble carrying out one of any lawyer's main responsibilities: giving objective, dispassionate advice to a client who may be too caught up in the situation to be objective and dispassionate.

It is actually in your interest, as a client, for your lawyer to be on good terms with the other party's lawyer. Cases don't settle without trial unless the lawyers communicate, and the parties communicate through the lawyers. So if the lawyers on opposite sides of a case are not on speaking terms, it will be more difficult for the case to settle. Even if the case doesn't settle, a cordial relationship between the lawyers yields benefits for both clients. For example, information about issues, witnesses and documents will likely be shared more readily. If a court deadline cannot be met, there is more likely to be agreement about requesting an extension of the deadline. Lawyers who get along are better able to represent opposing clients effectively and efficiently.

By the same measure, lawyers who dislike each other are more likely to use aggressive tactics against each other. Lawyers who don't get along often engage in legal wrangling, sometimes over silly disagreements, that drastically increases both the tension level and the legal fees for both parties. Cases that might have been resolved to everyone's satisfaction early through good communication wind up

going to trial because both sides have spent too much time and money on legal wrangling to settle. The lawyers were so busy bickering that they failed to spot opportunities to resolve the case before legal fees mounted.

Take it from us—judges hate to see lawyers bickering. We aren't surprised if the parties in cases are caught up in emotion—they are the people involved. We judges don't expect it, or tolerate it, when the lawyers get emotionally involved. In fact, many judges view it as unprofessional. So if your lawyer doesn't treat the other party's lawyer as an enemy, that's a good thing, not a bad thing.

The issue about the lawyer not believing in your cause is complicated. Some clients seem to want their lawyers to be yes-men, and get upset if their lawyers don't tell them what they want to hear. Such clients are often unpleasantly surprised when the judge renders the decision, because they haven't listened to or asked for their lawyer's advice. Lawyers are sometimes referred to as counselors for good reason; much if not most of their value consists in the advice they can provide based on their experience and expertise. Just as it is foolish to undergo surgery without knowing in advance what the risks are, so it is foolish to embark on a trial without having some notion of your chances of success. If you have a lawyer, get your lawyer's advice and take it to heart.

However, we are by no means saying that every client should blindly follow the lawyer's advice. Taking advice to heart means not ignoring it. It doesn't mean you must follow that advice no matter what. Sometimes there may be good reason not to take a lawyer's advice. Clients always have the right to make their own decisions, even against their lawyers' recommendations.

How do you know whether to follow your lawyer's advice? Getting a second opinion from a lawyer who has no connection or affiliation with your present lawyer is as good a way as any, although there may be a cost for a second opinion of any value. If the second opinion presents a significantly more optimistic picture than your current lawyer has, or is critical of your current lawyer's handling of the case, the second opinion could be correct, or the lawyer giving it could be trying to get your business, or both. As with the initial lawyer interview, be wary of lawyers who over-promise to get your business.

By the same token, if the second opinion seems a carbon copy of your current lawyer's opinion without any real explanation as to why, it is possible the second opinion isn't meaningful. The best second opinions may be the same as, or different than, your current lawyer's opinion,

but whichever it is, you will clearly understand why, and will be better able to draw your own conclusions as to how to proceed.

Parting Ways with Your Lawyer

Lawyer-client relationships end for many different reasons. Sometimes the client fires the lawyer; sometimes the lawyer fires the client; sometimes there is a mutual parting of the ways; sometimes the relationship has to end even though both the lawyer and client want it to continue. This section discusses the different scenarios and how to handle each of them.

Firing Your Lawyer

In a family law case, with very limited exceptions, the client has the right to terminate the lawyer at any time for any reason. (The exceptions involve cases when, due to the client's mental illness, mental incapacity or similar limitation, the court requires that the client have an attorney.) The reason you can fire your attorney at any time is that, with the exception just noted, any party to a family law case has the right to represent herself or himself without a lawyer. The lawyer licensing boards in all states have issued rules on when a lawyer may resign from representing a client and when a lawyer must do so. Generally, these rules recognize that a client has the right to terminate a lawyer at any time and require a lawyer who has been terminated to cease legal representation of the client.

What you may not have the right to do is to have your trial postponed or your case put on hold while you find a new lawyer. If you terminate your lawyer the day before your case goes to trial, or even in the middle of a trial, the court may require the case to go forward, whether or not you have found another lawyer.

The timing of your decision to discharge your lawyer therefore deserves advance thought. Generally, it is a very bad idea to wait until the last minute to fire your attorney, for two reasons. First, the court may not agree to delay your case so you can get another lawyer. Also, the longer you wait, the more difficult it likely will be to find a lawyer willing to step in and take over at the eleventh hour.

What you also may not have the right to do is to get any refund of what you have paid the lawyer. If your lawyer is charging by the hour and you paid a retainer against which the lawyer will submit bills, then you likely are entitled to a refund for whatever you paid over and above the multiple of the number of hours worked by the lawyer

and the lawyer's hourly billing rate. If you paid a flat fee, your entitlement to a refund is much less clear, particularly if your lawyer has expended substantial time on your case.

It follows from this fact of life that some ways of discharging a lawyer from a family law case are better than others, and that some fee arrangements are better than others in terms of yielding a refund if lawyer and client part ways before the job is done.

What you usually have the right to do is get your file back, with copies of court papers, correspondence (including e-mail messages), legal research memoranda done by or for your lawyer, and other materials. In most states, the rule is that a case file is owned by the client, not the lawyer. Under this rule, a lawyer violates the rules of ethics if the lawyer refuses to turn over the file to the client when lawyer and client part ways. Some states, however, recognize an exception to the rule if the lawyer is owed legal fees. In such states, a lawyer is entitled to claim an attorney's lien against the client case file to secure payment of fees owed, and may refuse to turn it over to the client or to the lawyer taking over the case, in the same way that in some states an automobile repair shop can refuse to turn over the vehicle until the repair bill is paid. In other states, however, it is unethical for the lawyer to refuse to turn over the file even if the client owes legal fees. In any event, the lawyer is normally allowed to make a copy of the complete case file before turning it over, and there may be portions of the file that the lawyer can withhold and not turn over, depending on the rules of legal ethics for the state in question. If your lawyer refuses to turn over your entire case file, you can check with the lawyer licensing board in your state regarding the ethics of the refusal.

Difficult Client or Difficult Lawyer?

Think twice before firing your attorney or doing anything that causes your attorney to fire you. In fact, if you have had more than one attorney, you may be wise to defer terminating your lawyer until after you have entered into a retainer agreement with another lawyer. Otherwise, you may have trouble finding a lawyer willing to take on your case. Many lawyers are reluctant to accept a client who has fired, or been fired by, a previous lawyer, or worse, more than one previous lawyer.

It is not uncommon for a client to change lawyers during a family law case. Going through two or even three lawyers doesn't necessarily reflect on the client. Sometimes the chemistry just isn't right, and sometimes the lawyer and the client part ways for reasons that have nothing to do with the case, such as the lawyer retiring or leaving law

practice.

However, there is a saying amongst lawyers—“Never be the third lawyer in a case.” If a client goes through more than two lawyers, it begins to look as if the problem lies with the client. If you are perceived as a “difficult client,” you may have trouble finding a competent lawyer willing to take over your case, and the lawyers who are willing may want a huge upfront retainer.

For a party in a family court case to switch lawyers many times can also be a red flag for the judge. Once the case is filed, the judge will know when there is a change of lawyers. The judge will likely think nothing of it when the first switch takes place, but after the third or fourth time, the judge may start to wonder. Again, think twice before firing your attorney or doing anything that causes your attorney to fire you.

Being Fired By Your Lawyer

Your lawyer’s right to terminate you as a client is more limited than your right to terminate your lawyer. Most states have enacted bar rules that define when a lawyer may terminate the relationship and when a lawyer must terminate the relationship. In most states, the situations in which a lawyer may terminate the representation include those in which the client has failed to keep an agreement regarding payment of legal fees, or in which the client’s conduct makes it unreasonably difficult for the lawyer to continue the representation (as, for example, when the client fails to keep in contact with the lawyer or advise the lawyer on how the client can be contacted).

Normally, if the lawyer has participated in a pending court case, the lawyer must receive the court’s permission to terminate the representation and depart from the pending court case. Provided the lawyer is not trying to resign at the very last minute, and as long as the court is persuaded the lawyer has good reason to resign, the court normally grants permission.

However, court rules usually require the client to be notified of the lawyer’s request to resign and to be given an opportunity to object. If your lawyer is trying to terminate the representation and you disagree, you should notify the court, preferably in writing, that you do object and would like to be heard. The court may not give you the opportunity to object in person, so your written statement to the court should cover what you would say at the court hearing if one were granted. Your written statement should focus on why you believe your lawyer should not be given permission to end the relationship.

If your lawyer resigns, you should request the entire case file. As noted above, when a lawyer is discharged, some states allow the lawyer to refuse to turn over the case file to the client (or the client's new lawyer), but other states do not. Even where such a refusal is allowed, the lawyer should have a much harder time justifying a refusal to turn over the case file when the lawyer, rather than the client, has terminated the relationship. If your lawyer refuses a request to turn over your file, check with your state's lawyer licensing authorities on whether the lawyer has the right to do so.

Your lawyer also should return to you any fees that have not been earned, and assuming you are not at fault for the lawyer's departure, perhaps should refund some of the fees that have been earned because you will have to pay to educate a new lawyer about the case.

Changing Lawyers but Staying with the Firm

If your lawyer practices in a firm with other attorneys, it may be possible for you to switch attorneys without leaving the law firm. If a client becomes dissatisfied with the lawyer assigned to the case, or a personality conflict emerges, the firm may be willing to transfer responsibility for the case to another attorney in the firm. One advantage of staying in the same law firm is that the firm may be less likely to charge the client for the cost of a new lawyer getting acquainted with the case. Particularly if the firm thinks you might have a point about not getting good service from the lawyer initially assigned, they may absorb without charge the time the new lawyer spends learning the case. If you switch law firms, the new firm or new lawyer has no particular reason to absorb the cost of the time spent learning the case.

Mutual Termination

Nothing prevents a lawyer and client from agreeing to terminate the relationship. Sometimes this happens when the client and the lawyer agree that the case can be resolved without the need for further legal services.

Required Termination

Occasionally a lawyer and a client have to part ways even though both would prefer otherwise. The most common explanation is that the lawyer, or another lawyer in the same law practice or firm, learns of or develops a conflict of interest that prevents the lawyer, and often the entire practice or firm, from continuing to represent the client.

Every state's rules of ethics for lawyers prohibit a lawyer from representing a client if the lawyer has an actual conflict of interest involving another client, former or current, which cannot be cured by consent of both clients. In some cases, if the lawyer is required to terminate the representation due to a conflict of interest, all of the lawyers in the same firm are considered to have the same conflict, so the case cannot be transferred to another lawyer in the firm.

Some conflicts can be fixed if the affected client gives informed consent, which often must be in writing. If your lawyer approaches you about a conflict of interest, it may be one that can be cured if you consent to your lawyer continuing to represent you. You are not required to consent, and you should not if you have any qualms about your lawyer, or any concern about whether your lawyer can or will represent you fully and diligently.

Sometimes the lawyer becomes ill or otherwise unable to continue the representation. Sometimes lawyers retire or leave their law practice for other reasons. Courts tend to be much more understanding in such situations than when the court views the departure as being someone's fault, whether the lawyer's or the client's. If your lawyer becomes unable to continue due to illness or some similar circumstance beyond anyone's control, the court is more likely to take steps to assure the client can retain a new attorney without the case going forward.

Finally, in some cases the lawyer may be required to withdraw because of the client's conduct or proposed conduct. For example, it is unethical for a lawyer to allow a client to falsely testify in front of a judge, if the lawyer knows the testimony is false. In this case, the lawyer will probably move to withdraw, and will indicate to the judge that the lawyer is not at liberty to explain why. This will inevitably alert the judge that there is some kind of problem, and will not be a good thing for the client's case.

The Transition

If your lawyer is leaving the practice of law, he or she may offer to hand over your case to another attorney. It is not unusual for a retiring lawyer to hand over cases and clients to other lawyers in the area. A client in that situation has the right to select a different attorney, but many clients go along with the outgoing lawyer's recommendation regarding which lawyer should take over the case. Often those recommendations are good ones—if you have liked your lawyer's outlook and approach to the case, odds are the person your lawyer is recommending to take over will have a similar outlook and

approach. Also, your lawyer may have selected someone to recommend based on knowledge of you and your case. So, depart from the recommendation if you wish, but don't do so lightly or without good reason.

Web References for Finding Attorneys

Most websites that list family law attorneys rely on advertising, so the names listed may or may not represent the family law bar in a particular location. Usually local court clerks, bar associations, and also the word of mouth network are as reliable a resource as attorney search engines on the Internet. Here are some Internet resources that may prove helpful:

<http://www.afccnet.org/>

The Association of Family and Conciliation Courts (AFCC) is an organization of people in different fields—lawyers, judges, counselors, educators, therapists, financial planners, court administrators—focusing on collaborative approaches to family court.

<http://www.aaml.org/>

The American Academy of Matrimonial Lawyers is a professional, by-invitation organization of experienced family law attorneys.

<http://www.martindale.com/Family-Law-law-firms-countries.htm>

This is an attorney search website maintained by a leading law directory.

Chapter 6

Starting a Court Case

“Lawsuit [noun]: A machine which you go into as a pig and come out of as a sausage.”

— **Ambrose Bierce**, *The Devil’s Dictionary*

“If you don’t like the road you’re walking, start paving another one.”

— **Dolly Parton**

I

If you are married, this chapter covers how you or your spouse can start a divorce case. If you are not married but have a child or children, this chapter covers how you or the other parent can start what in our state is called a “parental rights case”—a case to determine custody, child support and other matters relating to the child.

If you have a lawyer, your lawyer will handle most of what we cover in this chapter. You may still find the chapter helpful. If you don’t have a lawyer, reading this chapter should help you understand how the court process begins.

The first section of this chapter assumes you are the one starting the court case. The second section assumes the other party is starting the court case.

Who’s Who: Some Terminology

This chapter refers to the party starting the case as “the plaintiff,” and to the other party as “the defendant.” Many courts use these terms for parties in divorce and parental rights cases, but other courts instead use terms such as “petitioner” and “respondent.”

If You Are the Plaintiff—First Steps

If you have reached this point, you have read through Chapter 1 about assessing your situation and Chapter 2 about whether to proceed or not. Using Chapters 3 and 4 you have made initial assessments about your finances, your children and your property. You have (at least in your own mind) a plan for separating and a plan for short-term living arrangements and finances. You have reviewed Chapter 5 about

whether or not you should get a lawyer and we will assume that at this point you don't have a lawyer.

The first step is for you to determine what court or other forum has charge of divorces and family matters in your state. Lawyers call this "subject matter jurisdiction." It may be a specialized family court, a probate court or a civil court that also handles a broad range of matters in addition to family cases. In some states the lowest level of civil courts are called district courts; in other states, the courts are named courts of common pleas, county courts or municipal courts. In still other states, the courts that handle more sizeable civil cases also handle family matters. These are usually called superior courts, circuit courts or general courts.

The next step is for you to go to your local courthouse and to obtain whatever materials are available to assist self-represented litigants in filing a divorce. Courts in different states use different terms to refer to people who are representing themselves. In some states they are known as "*pro se*" parties, in other states they are known as "*in pro per.*" parties, and in still other states they are referred to as "self-represented litigants." Most courts will have a brief guide orienting you as to their initial procedures and may have "fill in the blank" forms for you to fill out for the complaint, petition or other initiating court document.

The clerk's office serves as the gatekeeper for all court actions. In a small rural court, there may be just a handful of staff who handles everything. In a large city court, the clerk's office may be quite large, and there may be a special section for family law cases.

Having a good relationship with the clerk or clerks who will be handling your case should not make any difference as to how your case is decided by a judge but can be critically important to the quality of your experience with family court. Court clerks often work under difficult conditions. Many people who come to court are not happy, so court clerks often have to deal with many disgruntled, unpleasant and downright rude members of the public each day.

Smart court users recognize this fact of life and make a real effort to be pleasant to court clerks. Ignorant court users do not understand this fact of life, and take out their anger and frustration—with spouses, partners, lawyers, judges or maybe themselves—on court clerks.

If the clerk is telling you something you don't want to hear (because it will make things difficult or inconvenient or expensive for you) it's

unlikely the clerk is trying to make you mad or make your life difficult. Usually the clerk is explaining how things are. What you should be doing is listening carefully. While court clerks are prohibited from giving actual legal advice, they can be quite helpful in giving you practical tips about the procedures, or telling you about other sources of information.

If the court that will be handling your case does not have any materials for you to review, this may be a sign that the court in your area is not particularly friendly to litigants who are representing themselves. Alternative sources of basic information and court forms may include a legal services program that is set up to represent lower income clients in your area; a lawyer or information and referral service operated by a local or state bar association, or a law clinic if there is a law school in your area. You should also try a web search using Google[™] or a similar search engine to see if any materials or forms for your court are posted online.

We will assume that your court has a brief instruction booklet and a set of forms that you can fill out to begin a family law case. Follow the instructions carefully. Make sure to include all of the information the court is asking for and, if you don't have it, make an attempt to get it before completing the form. If the information is simply unavailable, it is better to indicate that instead of skipping that portion of the form or forms. When you have the forms filled out, remember to sign them. Most courts require that the beginning form (usually referred to as a "complaint" or "petition") be signed under oath before a court clerk, a notary public, or some other person who is authorized to take official oaths. There will almost certainly be a filing fee that you will be asked to pay, unless you cannot afford it. We explain below how to ask for fees to be reduced or eliminated. The filing fee is not refundable if you later choose to dismiss your case.

The next step that you will be required to undertake is to "serve" the other party, meaning to notify the other party that you have started a court case. In most jurisdictions, courts will simply allow you to serve the court papers by sending the other party an "acknowledgment of service" or similar form. As we have previously noted, it is usually best to let your spouse or partner know in advance that you are starting a divorce case, and not have them find out when the court papers are dropped off. If you have had some preliminary discussions about starting a court case, you may feel comfortable asking your spouse or partner to acknowledge receipt of your paperwork and avoid the unnecessary (and sometimes quite expensive) complications of in-hand service.

Many states will allow papers in a family law action to be served in a less formal way by sending them by certified mail (return receipt requested) and then filing with the court the “green card” return receipt that you get from the post office. It may be that your state will not allow this. If your partner is not willing to agree to be served voluntarily, you likely will need to have your partner served “in hand” by a deputy sheriff or other authorized process server. If so, you will have to get extra copies of all the court paperwork, bring them to the sheriff’s office, give them instructions as to where and when they will be likely to be able to locate your partner, and pay a fee for them to make the service. The worst-case scenario is when your partner is no longer in the area and, after reasonable efforts, you have not been able to locate where your partner now lives or works. In that situation, the court may require you to provide “service by publication” which usually involves getting a special kind of classified ad called a “legal notice.” A newspaper will then have to publish that ad, repeating it a number of times over a few weeks. You then will have to file documentation of the “service by publication” with the clerk’s office, including copies of the actual legal ads placed in the paper. This process can be both very expensive and quite time-consuming.

Courts do have the ability to reduce or eliminate their fees if you really can not afford to pay them. Depending upon the situation, the court will be able to eliminate the filing fee and the service costs for the sheriff. In some cases, the court may even be able to pay for the costs of “service by publication.” You have to file a special motion asking for the court to allow you to proceed without payment of a fee, which is sometimes referred to as a “*in forma pauperis*” motion. Courts will usually not grant these kinds of motions if you have any money in the bank or other liquid assets with which to pay court fees, and may not do so if you have a job that pays enough to cover ordinary living expenses. If you feel that you can not pay your fee because you have to make the payment on your Mercedes, you should not expect the court to allow you to proceed without paying a fee.

Once you have completed service, one way or another, the next step is waiting for your partner to file an initial response, usually called an “answer.” The response could also be a less formal document called an “entry of appearance.” Most courts set a deadline for responding, often twenty days after the initial service has been made. If your partner does not respond within the specified period you may be able to proceed on a “default” basis.

If You Are the Defendant—First Steps

We hope your partner has done you the courtesy of letting you know ahead of time about the family law action he or she wants to begin. If so, this is a very good sign that your divorce or other family law case may be handled in a relatively civil manner. You should definitely respond in kind by accepting the paperwork and by acknowledging service if this option is open to you.

If your partner has chosen to surprise you by handing you the paperwork, or worse, by having you served at work by a deputy sheriff or other process server, the most important thing to do is to remain calm and not to immediately respond as your emotions dictate. Even if this is the first you have heard about the new court action it may still be true that it can be handled in a relatively civil fashion. You may want to explore that by discussion with your partner. We have a practical tip for that first discussion: those discussions often don't go well on the telephone, and it may not be wise to meet in a place where no one else is present. Having a discussion over a cup of coffee in a public place might well be the best way to proceed.

In any event, the worst thing you can do is to ignore the paperwork and hope that the issue will go away—it likely will not. We have seen many cases where the defendant is opposed to the divorce, and simply ignores the paperwork, or is told by a friend that the divorce can't proceed if he or she doesn't cooperate. Ignoring the paperwork is always a mistake, and in some situations it can be an irrevocable one with huge negative consequences.

The paperwork you receive will tell you that you must file responsive paperwork with the court, and serve a copy on the plaintiff within a specified period of time—usually twenty days from the date you get the papers. If you wish to consult with a lawyer before responding, this can be a very short amount of time in which to respond. Even if you are not represented, you can call the other party or lawyer and ask for an extension of time to file an answer. This is usually agreed to as a matter of courtesy. If the party or lawyer doesn't agree, you can file a "motion to extend" with the court, and once again these are usually granted, at least once, without a lot of drama.

If you cannot afford to talk to a lawyer or are unable to meet with a lawyer promptly, you should find out how to respond to the divorce papers you have received. Make sure you do it by the deadline. The court clerk's office may have a form you can use to do so. In some courts, a defendant need only file an "entry of appearance" to let the court know you wish to participate in the case and be heard when the time comes. Other courts require a formal "answer" that responds

point-by-point to the complaint. While some courts may accept a letter as an answer, many require more formality, and you should “admit” or “deny” each numbered paragraph in the complaint.

Meet the Doggone Deadline!!!

If you are the defendant, find out whether you need to respond in writing and, if so, when your response is due. Then get your response done and filed by the deadline. Too many people lose in court because they don’t pay attention.

(As we say to the students we teach at our local law school, it is far better to have an answer that is 90% right and filed on time than to have the answer be 100% right and 100% late.)

Make sure your answer contains information for the clerk’s office about how to contact you by mail and by telephone. If you also want to ask for a divorce, you should add a “counterclaim”—meaning a request for the court to act in your favor—to your answer. That way, the court still has to consider your request even if the other party tries to drop the complaint.

Every court requires you not only to file your response with the court, but also to send a copy to the other party or to the other party’s lawyer. Some courts require you to specifically certify or swear that you have done this. Generally, anything that a party in a court case files with the court clerk has to be copied to the other party.

If you don’t do anything, your spouse or opposing counsel may ask the court to “default” you, meaning to give the other party what they are asking for because you did not respond. Sometimes you can get a second chance to file a late response; other times it is not so easy. You can easily avoid this situation by filing a simple answer with the court on time, indicating that you are not in agreement, and that you would like an opportunity to come to court and be heard.

Next Steps for Both Parties

In some states, the court system will automatically schedule the next event in your case, which is commonly called a case management conference or a status conference. In other states, the court system will not do anything until you ask it to. So, you may have to request an initial conference or other court event from the clerk’s office.

If you and your partner have agreed to everything and there are no issues in dispute, the court system may allow you to proceed simply on the basis of your papers or may allow you to have what is called an

“uncontested final hearing” as your first event. In most states, there is a mandatory waiting period that must pass after the case has been filed before you can have the final divorce hearing. The waiting period may be as short as thirty days from the filing of the first court paper, but may be much longer, depending on the state’s law.

Once the case begins, it is critically important that you keep a copy of every document you file with the court system. It is equally important that you provide your partner with a complete copy of any document you file, however formal or informal it may be. Most courts require the document you file to indicate that you have provided a copy to your partner or your partner’s lawyer, and some states even require that you provide a sworn statement that you have made this kind of service every time you file a document. If you have not provided a copy to your partner, the court may well consider your filing to be an attempted “*ex parte*” communication with the court. If so, at best, the filing will be ignored or returned to you. At worst the court may impose a fine or some other sanction against you.

Court Conferences

In our state, and in other states, the court system actively manages family law cases to make sure that they do not get stuck in the system and move along to completion in a timely way. (Some family courts do not do this—if your court does not actively manage cases, it may just sit without action until or unless you ask the clerk’s office to schedule an uncontested final hearing or other interim event.) Our state calls the first event a “case management conference” and one of these conferences is scheduled as soon as the court’s docket permits after the second party’s time to answer has expired.

In our state these conferences are held by “family law magistrates” who are lawyers appointed by the court system to act in much the same way as judges do, although their jurisdiction is limited by statute. In other states, these presiding officers are called “family masters,” “commissioners” or some other similar term. (We will use the term “magistrate” to refer to all of these presiding officers.) Even though a magistrate may not have all of the powers of a judge, he or she will still have plenty of authority, and the magistrate can have a great influence on how your case comes out. As a result, you should treat the magistrate with the same respect that you would give to a judge. (One of us started out as a magistrate; this is hard work, and they are often over-scheduled. Treating the initial conference as a less than serious event is a good way to make a bad impression at your local courthouse).

Some courts require parties to bring information and documents such as pay stubs and tax returns to the initial conference, so that temporary finances and child support can be addressed. Read the court notice carefully so you go prepared.

The initial conference usually has four purposes:

- It is a triage, or sorting out event. The magistrate will want to know what matters involved in the case are contested and what matters can be agreed upon.
- It is a case planning event. Once the magistrate knows what is and what is not likely to be disputed, he or she will try to construct the most appropriate path to get it to resolution. (Your court system may have a set of formal “tracks.” If so, the magistrate will assign it to a track.) At a minimum, the next event will be specified.
- It is an opportunity for the magistrate to evaluate the behavior and attitude of both the parties and their attorneys.

[Note: Your mother was right! FIRST IMPRESSIONS DO COUNT!]

- It may result in temporary court orders. The magistrate probably will try to convert whatever agreements the parties have already reached into interim court orders. Even if there is no agreement, the magistrate will usually encourage the parties to agree to temporary arrangements for possession of the marital residence, primary residence of the children, a contact schedule, and an interim child support order.

A word of caution—the magistrate may push pretty hard to get you and the other party to agree to the terms of a temporary order on areas such custody, visitation and child support. You should cooperate in this effort—but not at any cost. A temporary order usually does not set a precedent, and all issues get considered anew at a final hearing. The reality is that initial arrangements tend to persist, and can set the pattern for the entire case. You should not agree to something you do not want to do just for the sake of agreement. If you are unsure, or if you need information you don’t have, you can defer making any firm agreements until the next stage in the case. However, you should be sure to give a good reason explaining why you are not yet ready to reach an agreement, so that you are not seen as a blind obstructionist.

If there are unresolved issues, the next step in the case will likely be mediation. The court may also schedule another conference following mediation. You should bring your calendar to the case management

conference and any later court events so that you can have some say in future scheduling.

Mediation

If it seems as though there will be disputed or “contested” issues in the case, the court may require the parties to go to mediation. In our state, and in many others, mediation of contested issues is required by law unless specifically waived by the magistrate or judge.

A magistrate or judge may choose to waive mediation if it seems as though one party is abusive or mentally ill, or if the issues are so simple that it will take less time and cost less for the parties to attend a brief final hearing, as opposed to mediation.

However, if the issues are at all complex or if the disputed issues involve your children, it is far more probable that the court will require mediation than not. If so, please review Chapter 7, which gives more detail about choosing a mediator, as well as how to prepare and conduct yourself at a mediation. If the court requires mediation, it is likely to schedule a status conference as the next event.

Status Conference

In less intensive cases, the court will likely set up a status or pretrial conference to follow mediation. If a full agreement is reached at the mediation, you may be able to use that conference for an uncontested final hearing.

If agreement has not been reached at mediation, the magistrate will decide whether there are immediate issues that will require the scheduling of an “interim hearing,” or if the issues can wait until a final contested hearing. If the parties need immediate action on issues such as occupancy of the family home, child custody and contact, and child support, the magistrate is likely to hold an interim hearing immediately, perhaps even with the status conference.

If your case seems complicated or heavily contested, the magistrate may also take other actions such as appointing a guardian ad litem (GAL), scheduling discovery, or requiring the parties to begin the selection of appraisers and other experts for trial.

Interim Hearing

Procedurally, an interim hearing is just like a final hearing or trial. It

is likely to be scheduled for a much shorter block of courtroom time, as the court will only want to deal with those immediate issues that cannot wait for a final hearing.

Interim hearings have two other important functions. First, you or your lawyer will have an opportunity to see how each party actually performs on the witness stand, and make any adjustments to the case plan if there are any surprises. Secondly, you are likely to get a sense of how persuasive your viewpoint will be to a magistrate or judge. This can be an important reality check. If you have been holding out for \$2,000 per month in alimony and you get awarded \$500 per month at the interim hearing, it is not only a reflection of how one judge assessed your case, but is also a reasonably good predictor of how another judge (or perhaps the same one) will react at a final hearing. You should carefully re-evaluate your strategy and case plan if the results at an interim hearing are different from your expectations.

Aside from that, you should prepare for an interim hearing in much the same way that you prepare for a final hearing. [\[15\]](#)

Pretrial or Trial Management Conference

The last event before a final hearing is usually another conference called a “pretrial conference” or “trial management conference.” If the court has not already done so, it probably will set deadlines for the completion of discovery and for the designation of expert witnesses (if any), as well as for exchange of their reports. The court is likely also to set a timetable for each party to provide a list of their anticipated witnesses and either a list or actual copies of all exhibits the party intends to call or introduce at trial.

Depending on the court and the judge, there may be a little flexibility in how these deadlines are enforced. Judges in family cases often will be as flexible as they can within the limits of the law, but if it appears to the judge that you have not complied with a deadline because you were careless or because you were trying to surprise or annoy the other party, you can expect a sanction (like a fine) or to have some of your evidence disallowed, or both. In extreme cases, judges can even default a party for failing to comply with a pretrial order.

Finally please remember—*Take any deadlines or other requirements seriously!* Calendar all deadlines so that you will not forget them. Then, when the time comes, meet them! [\[16\]](#)

Chapter 7

Avoiding Court Battles

“Discourage litigation. Persuade your neighbors to compromise whenever they can. Point out to them how the nominal winner is often the real loser—in fees, and expenses and waste of time.”

— Abraham Lincoln,

Notes on the Practice of Law, 1850

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voiding court battles is not the same as avoiding disagreements or arguments. It is virtually impossible to go through the process of separation or divorce without disagreeing and arguing. However, it is possible to complete the process without surrendering control over your own decisions. That is what happens when people need the court to make decisions instead of working out their own agreement. Giving up control to the court will increase stress for both of you, significantly increase the cost, and make it less likely that the two of you will be able to cooperate in the future.

My Way or the Highway: Don't Go There

Every family court judge has encountered parties who refuse to compromise or agree to anything unless they get their way on everything. Parties who adopt a “my way or the highway” attitude often wind up getting less after trial than they could have through a settlement of some or all of the issues in the case.

Remember, you can't always get what you want, especially when it comes to court cases. You get what the judge decides you should get. The parties who do best in court, whether in a trial or in a settlement, are those who have realistic expectations and reasonable goals, and who therefore make good decisions about whether to go to trial or settle. The lawyers who do best in court are the lawyers who do best at helping their clients make those good decisions.

Working Things Out Between Yourselves

If things are going well, and you and your partner are able to reach an agreement between yourselves, this is the obvious and easiest way to avoid court battles. A good way for both of you to accomplish this is by keeping the long-term goal in your mind. Instead, more commonly,

people tend to focus on the more concrete and immediate issues.

If the two of you do not have children, the mutual goal should be to complete a graceful disengagement. This is a separation which is fair to both of you and which allows each of you to move on and beyond as soon as possible.

If you do have a child or children together, you can't disengage. Instead, the long-term goal should be to get along for your children's sake. They deserve to have a happy and full childhood, one that is not blighted by being in the middle of their parents' continuing disputes. If the two of you can focus on one of these appropriate goals, you will be less likely to have an agreement derailed by a focus on the division of money, property or other short-term issues.

Every couple is different, every situation is different. But if you have reached the point where you have decided to divorce, you know (perhaps better than anyone else in the world) what kinds of approaches to communication are likely to work with your partner, and what kinds of approaches will "push his (or her) buttons." The obvious recommendation is that it will be better for both parties to use techniques that are likely to work effectively with the other partner. The human temptation is to use communication techniques that produce immediate gratification. To avoid giving in to the easy temptation to score points or poke at your partner's emotionally vulnerable spots, you must plan ahead; devise a strategy that is likely to be effective (given what you know about each of you) and then stick with that strategy.

An example of a communication technique that is not likely to be effective is for you to call your partner on the phone without prior arrangement and say something like "I'm calling to talk about how to divide up the bills." More likely than not this conversation will deteriorate quickly into something like, "No, I'm not going to be responsible for the Sears bill—you bought all those tools we didn't need." Followed by the response, "Oh, no—remember those curtains you charged on the Sears card? I never liked them anyway. That bill is at least half your responsibility."

A conversation that is far more likely to succeed might go as follows: "I know this is a difficult topic, but we have to divide up responsibility for our bills. Can we meet for coffee Saturday morning at the coffee shop? I've come up with a list of the bills and some ideas for dividing them, and I could e-mail it to you by Thursday so that you can see it beforehand. You may agree with it or you may want to take a

different approach. And if you have a list, or want to make one, I'd be happy to look at it."

The basic difference between the two approaches? One shows respect for the other partner's time and viewpoint; the other does not. You would be amazed at how often separating partners fail to see the difference.

When to explore this option; when not to explore this option

We recommend that you *not* attempt to work things out directly with your partner in a number of situations. Most importantly, if you have been in a relationship with domestic violence (or if your partner has been successful in gaining most of the power in the relationship or has controlled the decision-making) self-negotiation is at best likely to result in a very unbalanced result. At worst, it may put you in a situation of actual physical danger. If your partner has been in control and you try to negotiate on an equal basis, it may be very threatening to your partner and he or she is likely to try to retake control by lashing out emotionally or even by using physical violence.

Similarly, if your partner has a mental illness or a serious substance abuse issue—whether abuse of alcohol, illegal drugs or prescription medications—it may not be a good idea to try to work things out without the help of a third party. First, for safety reasons, in case your partner's problem triggers an irrational episode, and secondly, because the chances of success are not good.

However, it is also important not to demonize your partner. No human is perfect or even approaches perfection—we all have feet of clay. We assume you and your partner are unhappy with each other, or you would not be going to family court. But ordinary foibles should not be inflated into serious systemic problems just because your relationship is dissolving. To exaggerate your partner's issues and shortcomings may prevent what could have been a perfectly reasonable and amicable settlement.

Finally, do not expect emotional or moral vindication from a settlement or the legal process. In very rare cases, the story may be so clear, and the misconduct of one party so apparent, that a judge's decision may explicitly hold one party accountable for the relationship's troubles. Almost always, a judge's decision will not do that. Instead, the judge will focus on making decisions instead of focusing on assessing blame. *Holding out for moral satisfaction, at the expense of a good practical resolution, is a very, very, low percentage bet.*

“Judge, Tell Him/Her that I’m Right and He/She’s Wrong!”

They didn’t have lawyers in their divorce case. It started as a trial but it turned out that they agreed on everything. So instead of hearing testimony and making rulings, I took them through the finances, the property and the children—asking questions and clarifying the terms of the agreement. At the end, I said, “That covers what I need to know. Unless you have anything else, I will put all this in the form of a divorce judgment. I appreciate your being able to reach an agreement. Is there anything else we need to discuss today?”

It turned out that there was. She said, “And I want him to apologize for putting me and the children through all this.” He blew up: “What do you mean I should apologize? You’re the one who...”

“Stop,” I said. When he didn’t stop and she started in, I held up my hand, palm out as if I were a traffic cop, and said more loudly, “STOP.” They stopped. I then explained to them the no-fault concept of divorce in our state. I commended them on being able to agree on the important things, and to put aside their natural feelings. I suggested it was time to move ahead with their lives.

“Well, I still want an apology,” said she. I went into higher gear. “Are you telling me that everything we covered—all the areas of agreement, many of which benefit you and your children—are out the window unless you get this apology?”

She said nothing. I continued, “Any apology he might give you at this moment is only because he wants to get this done and over with. If you are due an apology, and you may be or you may not be, shouldn’t it be something that comes from the heart?” I turned to him, “And are you telling me you have nothing to apologize for? You’ve never done or said anything you shouldn’t have?” And to her I said, “And you haven’t either?”

They both looked back at me, without saying anything. I said, “Can we just finish this up?” Again, they just looked at me. We finished up and they got divorced.

The point: The main objective of family court is to figure out how it’s going to be, by agreement or otherwise, not to tell people who was right and who was wrong. That may happen as part of the process, but it isn’t what the process is about.

— A.M.H

If you are trying to settle the case in a non-adversarial manner, it is not very likely that a mediator will give one party or the other moral or emotional satisfaction on fault or responsibility issues. This is an unrealistic goal if you are trying to settle the matter.

Finally, if an unassisted negotiation is not going well, or if impasse is reached, it is time to reach out for help. Further attempts at unassisted

direct talks between the parties will simply harden everyone's positions and make an agreed settlement harder to achieve.

Successful negotiation techniques for working it out on your own

You and your partner can try to work things out without lawyers. There are specific techniques that mediators learn that you can use to try to enhance the odds of successfully reaching agreement with your partner. Here are some of them.

Meet on neutral territory: Don't meet on either of your "home turf." It will not be comfortable for at least one party. If things go really badly, it may not be easy for the other party to safely terminate the conversation and leave.

Focus on the future, not the past: Each party will have suffered hurt as the relationship deteriorated. You are unlikely to ever resolve differing perceptions of the causes. You cannot go back and dissect the relationship to try to compensate each party for every imbalance in what each party contributed (fiscally or otherwise) or what each party spent, either for good or ill. Focus instead on what needs to be accomplished now to achieve your long-term goals.

Avoid blame: Blaming your partner will only generate reciprocal blame and ill feeling, not agreements. Blaming is about the past. Time to move on.

Treat your separation or divorce as a business issue; focus on concrete and achievable goals: We know, as do you, that a settlement agreement is not simply a business issue, but you have to act as if it is. You owe it to yourself not to let your emotions dictate your decisions and your actions. You are trying to solve definable problems. Healing is not likely to occur via a settlement agreement, nor in the time frame you have to resolve the matter; don't try to get these results now.

Use "I" statements instead of "you" statements, tied to objective facts: Statements that focus on "you" often involve blame and accusation. If one party says to the other, "You are not being reasonable. It's my fly rod; it always has been." it is likely to provoke an equally unhelpful response. A statement that says, "I feel that your asking for my fly rod is not helping us resolve this; you haven't ever fished," is assertive without asking for a hostile response.

Plan ahead: Make lists of what you want to accomplish ahead of time. Be specific. The more detailed information you have the easier it will be to evaluate a proposal. If neither party is sure if the Macy's bill is

more or less than the VISA card's bill, it will be impossible to tell if a proposed division is fair.

Figure out what your priority items are and attempt to predict what your partner's priority items are: If keeping one particular car is a deal breaker for you, you need to know that ahead of time, and you need to be clear about that. If you don't really care about the car, but know that your partner has a strong attachment to it, be prepared to let it go, but think about what you want in place of it.

Don't overreach: If you have unrealistic expectations, the chances of an agreement plummet. Moreover, if this carries over into a contested hearing, the judge may decide that you are trying to abuse the process, and you may get much less than if you made a reasonable proposal.

The Judge's Decision in the Divorce Case Between Paul McCartney and Heather Mills.

*Consider the following quote from **McCartney v. McCartney**, [2008] EWHC 401 (Fam):*

"But I regret to have to say I cannot say the same about the wife's evidence. Having watched and listened to her give evidence, having studied the documents, and having given in her favor every allowance for the enormous strain she must have been under (and in conducting her own case) I am driven to the conclusion that much of her evidence, both written and oral, was not just inconsistent and inaccurate but also less than candid. Overall she was a less than impressive witness.

.....

If the wife considers that my adjudication to be unfairly low, then I would say this. In the end it is for the applicant in ancillary relief proceedings to make a rational and logical case for the award that is sought. If an applicant puts forward an excessive, indeed exorbitant, "claim" which then she (or he) attempts to moderate by way of open offers, but which offers still fail to be supported by rational and logical bases, then the applicant has only herself (or himself) to blame if the court awards much less than what the applicant expects. This case is a paradigm example of an applicant failing to put a rational and logical case and thus failing to assist the court in its quasi-inquisitorial role to reach a fair result."

OUCH!

List out all issues before attempting resolution of any: It is *very bad* if you lead the other party to believe that all issues have been settled, and

then you introduce a new issue. The way to avoid this is for each party to list out what all of the issues to be resolved are before you begin the actual negotiations.

Reframe issues: How issues are described can have a large impact on how they are perceived by the other party. Perhaps there is an impasse over the original vinyl copy of Led Zeppelin III, which can't be resolved as the parties discuss their music collection. It may be helpful to say, "Let's put that aside for the moment, and bring it back up when we divide other items." (You may prefer to get a favorite book or an art print instead of the album.)

Take breaks: Tired, cranky people don't make good decisions. If you have made progress, but are tired and feel the atmosphere cooling (or heating up), it is time for a break, probably until another day. Mediation sessions are often limited to two hours for this reason. We have seen many times that solutions to problems which have previously seemed impossible can appear after a good night's sleep. The subconscious can be wonderfully creative.

Produce written drafts and review your partner's comments: Parties to a negotiation can often bridge impasses by "writing around them." A creative solution to an issue that seems impossibly complicated or vague when first offered by one party can be greatly clarified if that party writes it out, puts it away, and goes back to review and edit the proposal after a period of time away from it. Submitting it in advance to the other party may help generate a reflective response rather than an instinctive rejection.

Reduce a final agreement to writing but don't sign it at once. (Usually.): If you reach an agreement in principle, reduce it to writing. Sometimes the devil is in the details, and the process of writing will surface problems that will require further negotiations. However, a period of time that allows each party to think about it is usually useful. (On the other hand, every lawyer and judge is familiar with cases where a tortuously negotiated agreement will disappear if the parties are given time to reconsider. If you find yourself in this situation, get it done—*right then!*)

Consult with objective advisers: If a separation or divorce has been at all messy, each party will have cultivated allies amongst their friends, relatives and other supporters. Remember, these people will have only heard about the matter as viewed through your lens. Unfortunately, they likely have a point of view that is not objective.

You don't need a cheerleading squad; you need good advice. If you turn to the people who support you for advice about a proposed divorce settlement that a neutral might think was a fair resolution, the members of your "team" may tell you that you aren't getting enough for all the heartache and trauma you have been going through.

You need to get a more balanced appraisal of the proposed agreement. If you have not previously consulted with a lawyer, you may want to do so now, if just for the limited purpose of reviewing the proposed settlement. If you don't want to do that, see if there is an organization in your community that works to help children who are living through their parents' divorce. They may be able to refer you to another kind of neutral professional.

Finalize the agreement, and submit it to your court: Once the agreement is acceptable to both parties, it will have to be signed and then submitted to the court as the basis for an uncontested divorce. Each state has its own rules for this, but most require you to sign under oath, and in front of a person authorized to take oaths, such as a notary public.

Please understand that a settlement agreement is a binding contract. Signing a settlement agreement is an action that has its own independent legal significance, even before it is approved by a court. Once it is signed, it may be very difficult to make any changes. Before signing it, make sure it is accurate and that it covers everything.

Some courts will issue a divorce judgment based on the written agreement only. Others, like ours, will require one or both of the parties to come to court and testify at a brief hearing. While uncontested hearings are sometimes derailed by a judge who sees an issue which neither party has thought of, this is relatively uncommon. While an uncontested final hearing has great legal and emotional significance, the process is usually quick and easy.

Getting Outside Help—Using Alternative Dispute Resolution (ADR)

When we started to practice law there was only one model for resolving family law cases. The "no-fault" divorce revolution had begun less than a decade earlier in 1968 in California. While many states had adopted full no-fault divorce laws by the mid-70s, the actual practice of law was still rooted in the traditional techniques used to resolve cases in the old "fault based" system. If the parties could not agree, each hired a lawyer and the lawyers did what lawyers

do: They went to court and began litigation.

In the intervening thirty or so years a number of new techniques have evolved for resolving cases if the parties can't agree but still stop short of a full-blown court battle. These techniques are generally lumped together under a term called "Alternative Dispute Resolution" or "ADR." Specific ADR techniques used in family court cases include mediation, arbitration, mediation-arbitration, and collaborative divorce. Mediation is the most common technique, so we will discuss that fully before introducing the other ADR options.

Mediation

Most commonly, when parties in family court cannot agree to a full resolution of their issues, the usual type of alternative dispute resolution is the use of mediation. Mediation is a consensual process conducted by a neutral third party, called a mediator. A mediator's only interest is in trying to help the parties reach an agreement that each can accept. Mediators do not decide cases themselves, but they help the parties come to their own decisions. Mediators do not make recommendations to a judge and have no power to force their views on either party.

Mediation can occur at any point in the process of a family law case. The parties can agree to hire a mediator before either party files any documents with the court. The court may require mediation, either through a court-connected mediation program, or by requiring the parties to select an independent mediator before any court hearings. When cases are ready for trial, a judge still has the authority (in most states) to require the parties to make another attempt at settlement with a mediator, or perhaps with another type of ADR process.

How to find a mediator or other ADR professional

If you are represented by an attorney who is experienced in family law, that attorney will likely have a very good sense of who are the best mediators in your area. Often, if both parties have attorneys, the attorneys will jointly agree on the use of a particular mediator.

If you are representing yourself, there are ways to make an informed choice about who would be a good mediator for your case. At least as a starting point, you might speak to an attorney you know, or to other friends or acquaintances who have used a mediator.

Either because you don't have a suggested mediator, or because you want to know more about the experience of someone who has been

recommended, there are other sources of information. The family court in your state may have a court-connected mediation service, and in some states you may be able to utilize that service even before filing a formal divorce case. If not, the family court may maintain a roster of court-approved mediators, or alternatively, just a list of mediators who have not been evaluated in any way by the court.

If such a list is not locally available, you can contact the Association for Conflict Resolution (ACR), a national association of mediators and other ADR professionals. This association has a website located at <http://www.acrnet.org> which contains a provider search function. Many states have similar organizations for mediators, with widely varying names. One way to find an appropriate group would be to use an internet search engine such as Google[™] and enter the name of your state and “mediation”—for example, if you put in “California mediation” you will get a list of websites including the Southern California Mediation Association.

How to choose a mediator or other ADR professional

There are many factors to take into account when selecting a mediator. First, find out if your court system requires you to select a mediator on a list or “roster” which is maintained by the court; and if so, find out if you should limit yourself to that list.

Whether or not you are limited to a certain list, you will want to consider a number of things in making your selection, including the mediator’s experience, his or her style, cost, convenience, both in terms of geography and hours of operation.

Many lawyers think that mediators who have a more assertive style are better able to resolve family law cases than those who have a passive style. Accordingly, we suggest that you should pay careful attention to any observations or suggestions that are made by a mediator. The mediator has probably helped to resolve many cases, and may well have a good sense of what is achievable and what is not if you go to a hearing. However, you are never obligated to accept the mediator’s suggestions if you do not wish to do so.

A number of courts and organizations post guides online that go into more detail about how to best select a mediator. One very good example has been posted by the Kansas court system. You can find it at:

<http://www.kscourts.org/programs/alternative-dispute-resolution/>

How to Make Effective Use of Mediation

You should treat any mediation session with as much seriousness as you would treat another important event in your case, such as a court hearing or conference. In many cases, mediation represents the parties' best (or possibly even last) chance to resolve their case successfully. Like any court or court-related event, it will be most productive if you prepare for it in advance, and if the resulting decisions are carefully documented and followed up on later.

Preparation for Mediation

The family court may require you to complete and file a financial affidavit before your mediation is held. These statements are signed under oath, so you should take a lot of care in their preparation. Even if you are not required to complete a summary form by your state's rules, it is a useful exercise to try to get a complete picture of your assets and liabilities. We have included a set of financial worksheets based on Maine's required financial affidavit in Appendix A. Completion of these forms is a good first step.

Strategizing the big issues: First, make a list of all of the issues you want to have resolved. Use our mediation and settlement agreement checklist in Appendix C to make sure you think of everything you need to discuss in mediation. Then, once you have a list of the issues, start thinking of good solutions to each issue.

Consider long term solutions such as:

- What arrangements will be best for our children?
- Where do I want to be (literally or figuratively) and what do I want my life to look like in five years?
- What kinds of arrangements will help me get from where I am now to where I want to be?

Getting the details right: Additionally, it will be useful to have the following other information with you at mediation:

- Your children's names, dates of birth and social security numbers.
- Your employer's name and address. Copies of your 3 most recent pay stubs. Copies of the previous two years tax returns and wage and

income documentation (W-2 and 1099 forms).

- A copy of the deeds to all real estate owned by either or both parties. If it is not on the deed, also have the “book and page number” assigned by the applicable registry of deeds. Also include an estimate of value for each property.
- A list of all items of personal property that you want to have allocated to you, with an estimate of its current value if you had to sell it today. (For vehicles, mobile homes, boats and other large assets, bring a copy of the title, and a value estimate printed from a website such as NADA, Kelly Blue Book or Edmund’s can be very helpful.)
- A copy of the most recent statement for each of your bills.
- A copy of the most recent statements showing balances for all retirement assets, including pensions, IRA’s and Keogh, 401(k), 403(b) or similar tax deferred savings plans. If you have one, a copy of your Social Security work and contribution history form can be very helpful.

How to Conduct Yourself at Mediation

Mediation is an informal process, but it is still a serious event. Some element of “venting” is often part of the mediation, so you should be prepared to hear your partner share his or her view of things, which may be at great variance with yours. Nevertheless, you should not reject it out of hand. If you can understand how your partner views the situation, it may help you both figure out a solution you can both agree with.

Both sides should commit at the outset to use polite and respectful language to and about the other. The mediator should enforce this ground rule; if he or she does not, or if you feel threatened in any way, you should ask the mediator for a *caucus* (this is a break when you and the mediator meet separately, without the other party), so you can express your concerns, and have the conduct stopped.

You should be prepared to make proposals and to fairly consider options proposed by the other side. Listen with an open mind. Think about what arrangements will work best in the future, even if your present feelings about your partner are distrustful or negative.

Mediation can be a transformative event, and we have seen it settle cases we thought had a very low probability of successfully avoiding trial. It is very important that your lawyer let you talk, and that both

of the parties, rather than the lawyers, guide the negotiation. If the lawyers do all the talking, the mediation can deteriorate into nothing more than a dress rehearsal for the trial, which defeats the purpose of mediation.

Transforming a Mediation Agreement into a Final Document That Resolves the Case

If agreement in principle is reached, you and your partner should list the points of agreement and sign that outline. This will prevent “buyer’s remorse” turning into varying memories about just what was agreed. This outline will need to be turned into a fully detailed settlement agreement. If you have hired a private mediator, the mediator may be able to prepare the agreement for you. If you have attorneys, one will usually agree to prepare a draft for review by the other. If neither party has an attorney, and are using a court mediator, the parties may jointly want to hire a single attorney to prepare the document.

In general, the agreement will need to be submitted to the court for review, and hopefully approved by a judge or other judicial officer. Even if it is not submitted, the agreement might be legally enforceable as a contract, but it is far more clear-cut and more easily enforceable if it is ratified as a formal court order.

Beyond Mediation; Other ADR Processes

Arbitration

Arbitration is similar to mediation in some ways, but is also different in important respects. It is called by other names in some states, including “private judging” or as a formal referral of a pending court case to a “referee” or “special master.” (If your state’s court rules are modeled after the Federal Rules of Civil Procedure, as they are in many states, you may find the specific procedure in Civil Rule 53.) The most important difference between arbitration and mediation is that the arbitrator is empowered to make the actual binding decision, rather than helping the parties to come to an agreement, as a mediator does. Accordingly, while the decision to use an arbitrator is consensual, the outcome is non-consensual.

The arbitrator’s decision (which may also be called a “report”) is binding, and will likely be the final outcome of the case. Although parties may have an opportunity to object to an arbitrator’s decision, courts usually give great deference to the arbitrator’s decision, and the

odds of getting it reversed are not good.

If a party does wish to object to the arbitrator's decision, the time frame is often very short—ten days is common. If the objecting party has not ensured that a proper record has been made of the arbitration hearing (usually by a written transcript and copies of all exhibits) the court is likely to let the arbitrator's decision stand without detailed review.

Mediation-arbitration

Mediation-arbitration (or “med-arb” in lawyer jargon) combines aspects of mediation and arbitration. The parties begin by using the neutral as a mediator, and if the case is resolved by agreement, so much the better. However, the parties also agree in advance that if any of the issues in the case, are not resolved in mediation, then the neutral will shift to the role of an arbitrator, who will render a decision on those issues.

Collaborative Divorce

Collaborative divorce is a relatively new concept that has become more established in some states than in others. We mentioned it in Chapter 5, about selecting and working with an attorney. We encourage you and the other party to consider the collaborative approach. It strikes us as a very important paradigm shift in the family law world, one that promises to greatly reduce courtroom conflict, thereby reduce the costs of family court with their lawyers and the process and increasing the parties' level of satisfaction with the process.

Court Settlement Conferences

Judges have been using informal efforts to settle cases just before trial for as long as there have been judges and lawyers. You may expect that if your case is going to trial the presiding judge will want to meet informally with the lawyers and try to help construct a settlement. Judges know that many cases that would or could not settle in the days or months beforehand can settle “on the courthouse steps,” and may try to encourage this process. The academics who study our field sometimes call this “bargaining in the shadow of the law.” Judges might call it “brokering a settlement.” Lawyers often call it “judges banging heads together.” This can be a tricky process, both for the lawyers and the judge. The lawyers know this judge will be trying the case, and will not want to alienate the decision maker. The judge may

have a good idea how the case may turn out, but wants to maintain enough distance so as to be able to preside impartially over the trial if the case does not settle.

Some courts institutionalize the process, with the goal of preserving its advantages while avoiding the disadvantages. (Our family court is one of these.) We arrange “judicially assisted settlement conferences,” in which a judge, other than the one who will be trying the case, conducts a settlement conference. Parties are free to reject the judge’s suggestions, but should not do so lightly, as judges can often predict fairly accurately how another judge will decide the case (if the evidence is admitted as the lawyers expect.)

Conclusion

If you haven’t already been able to tell, we are both of the firm opinion that most family law cases are better resolved by an agreement than by a court hearing. This is not because we want to avoid work. We suggest this because we have seen the results time and time again...a party rejects a reasonable settlement offer, insists on a trial at great expense of money, sweat and tears, and finally ends up no better off, and often worse off, than if the proposed settlement had been accepted.

Both you and the other party owe it to yourselves and to your children (if you have them) to make your own decisions for the future instead of asking a judge to make them for you. The way to make your own decisions is to work out reasonable agreements. [\[17\]](#)

Chapter 8

How Family Courts Work

“Just remember, it is assistant clerks and secretaries

who really make the world run.”

~ **Hugh Calkins, Esq.**

(at a training for new

legal services lawyers)

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his chapter is a guided tour of family court, but it is no substitute for becoming familiar with the court that will be handling your case. All family cases are handled in state courts, not federal courts, and every state has a different system for handling family cases. From state to state, there is variation in almost everything—down to what the family court is called. This book will give you a good foundation, but you still need to get to know your court.

If there is one single point to remember about court, it is this: *Don’t ignore your case.* This means reading the papers you receive about the case. This means meeting the court deadlines. This means showing up at court when you have to. The penalties for ignoring court papers, missing deadlines and not showing up can be severe, up to and including losing the case.

How to Get to Know Your Court

Probably the best way to begin is to find and read the materials available about your family court. Most courts have websites, and most of those websites either feature, or link to sites that feature, information about the family court procedure in your state. Appendix E to this book includes a web link for the National Center for State Courts, which maintains a list of all state court websites. If you are unable to find those materials online, there should be brochures or pamphlets about family court procedures available at the courthouse. In some states, there are legal services or bar organizations that have on-line and printed materials available.

If you still have questions after you have read the available family

court materials, pay a visit to the court clerk's office during a less busy time—late morning and mid-afternoon are usually good times in most courts. Busy times for clerk's offices often come first thing, when the morning dockets are starting up, at the very end of the day, and over the lunch hour, when the clerk's office may be short-handed. If you are friendly and patient, the clerks may be willing to take the time to answer your questions. Keep in mind that they are not allowed to give you legal advice, but they can explain the court procedures. Also be aware that they have limited time for questions. This is why we suggest you read the available information before speaking to the court clerks—so you don't ask questions that are answered in readily available materials.

A Family Court by Any Other Name is Still a Family Court

This book refers to the court that handles divorce cases and cases involving people in a relationship who haven't been married as "family court." But around the country, the courts that handle those cases have many different names. For example, the court that handles family cases is called Circuit Court in Illinois and Maryland; Chancery Court in Mississippi; Superior Court in Arizona, Arkansas, California and Indiana; Court of Common Pleas in Pennsylvania; District Court in Colorado, Idaho, Maine and Montana; Probate and Family Court in Massachusetts. In Delaware, Florida, Vermont and West Virginia, the family court is actually called Family Court.

An Overview of the Court Process from Filing to Appeal

Most family cases follow a particular sequence. Here is a description of how a family case might develop.[\[18\]](#)

Filing: Every family court requires the plaintiff—the party starting the case—to file a written statement of position, often called the "complaint" or the "petition." The plaintiff also has to file papers with the court clerk, and has to notify the defendant—the party who is being taken to court—that the case has been filed.

Summons to court; service of the complaint: The defendant (called the respondent in some courts) has to be "served" with the court papers that are being filed by the party that has started the court case. Usually those papers consist of the complaint or petition that the plaintiff has filed, along with any attachments or other papers filed with it, and also a summons.[\[19\]](#)

Proof of service: Once the complaint and summons are served, the

deputy or other person serving those documents fills out a form called proof of service or return of service, and either files it with the court or sends it to the plaintiff for filing with the court.

It is the filing of the proof of service that tells the court that the defendant has been properly notified of the case and that the case can move ahead. On the other hand, until the proof of service is filed with the court, the case cannot proceed through the court process. Some courts have a deadline, by which the plaintiff has to serve the complaint, or the case will be dismissed—meaning terminated.

Response/Answer: In some courts, the defendant must file a response to the complaint if the defendant wants to present her or his position in court. In those courts, if a defendant fails to respond within the deadline contained in the summons, the defendant may be defaulted—meaning that the defendant will not be allowed to contest what the plaintiff is asking the court to do in the case. In other courts, the defendant is allowed to respond any time before the case is finalized.

Notice of Scheduling Conference or Order: In many states, the next step in a court case is for the court to send notice by mail to both parties. In some courts, that notice contains deadlines for the parties to exchange information on matters like child support. Sometimes the notice gives the date and time of a conference at the court.

Continuances and Extension: A continuance is a postponement of a court date, and an extension is a postponement of a court deadline. If the court schedules something that you should attend but you cannot, you should file a motion to continue the court event to another day. Likewise, file a motion to extend a deadline that you cannot meet. A copy of anything you send to the court must also be sent to the other party (or the other party's attorney if there is one) and some courts require you to certify that you have done so.

Keep in mind that postponements of court dates and court deadlines should not be requested except for good reason—the court expects the parties and their lawyers to make the court case a priority. On the other hand, every judge recognizes that due to employment, pre-paid vacation plans, illness or other good reason, people sometimes cannot come to court when the court expects. Likewise, deadlines sometimes cannot be met despite your best efforts. A motion to continue or extend should identify what court event or deadline is involved and why the motion is being filed, and it also can tell the court how much of a postponement is being requested.

Initial Conference: In most courts, the parties are notified to come to court for a meeting with the judge or another court employee—sometimes a mediator or other person whose job is to help parties navigate the court process. What is discussed at the initial conference varies from court to court. Often the notice scheduling the initial conference will list items for the parties to bring, such as current pay stubs or tax returns, or copies of any other court orders that may be in effect.

At the initial conference, the judge (who in some states may have a different title, such as magistrate or master) usually asks the parties what they are able to agree to and what is contested. Areas of agreement will likely be documented in a temporary or interim order.

As to areas of disagreement, some courts will address them right at the initial conference, by holding a short hearing at which each party can testify and present documents or other information.

Hearing on Interim or Temporary Issues: Often people in a family case cannot wait for decisions during the months or even years that a family case can take before coming to trial. They may need the court to make decisions now on questions like who resides in the home temporarily, or who is responsible for what bills between now and the trial, or which parent will have the children on what days and times.

Most courts have a procedure for making temporary decisions of this kind—namely, decisions that define the parties' rights and responsibilities temporarily while their case is going through the court process. In most courts, these temporary or interim decisions on contested issues are made at a court hearing—often called an interim hearing or temporary hearing—at which the court takes testimony from the parties and perhaps other witnesses, and makes a decision. The hearing is similar to the trial that will happen toward the end of the case if the parties still disagree on any issues. However, a hearing held to temporarily resolve issues is usually not called a trial. A trial is the major hearing held at the end of a case, to enable the court to make a decision on all issues.

Interim or Temporary Order: At some point early in the life of a family case, the court will usually issue a court order that defines the parties' rights and obligations during the time before the case reaches trial. Sometimes those orders are issued after interim hearings on contested issues. Sometimes, they are issued based on an agreement between the parties reached after negotiations or after mediation. Interim orders usually last until the trial at the end of the case, when the court

will hear evidence on all contested issues and make its final decision in the case, subject to appeal.

Interim orders can be changed while the case is waiting for trial, if needed to adjust to changes in the parties' situation. A request to change a court order is usually called a motion to amend, or in some courts, a motion to modify. Once an interim order is entered, it usually can only be changed if the party asking for the change can prove that there has been some change in the parties' situation. The fact that a party disagrees with an interim order is usually not considered a valid reason to change it.

Settlement and Mediation: Like many other types of cases, most family cases wind up not going to trial. Sometimes one party or the other simply does not participate, and the other party wins by default. Even when both parties participate in the case, most cases are resolved by agreement without a trial.

Many courts require family cases to go through mediation before any trial, and many cases are resolved by agreement through mediation. [\[20\]](#)

Discovery: Most courts allow, or sometimes require, the parties to a family law case to exchange information about such things as income and expenses. Parties can also obtain information from third parties in various ways. In most courts, this process of exchanging information between parties, and obtaining information from others, is called "discovery." One party's request for information or documents from the other is called a "discovery request." Most often, it is the parties who have attorneys who utilize the discovery process, because lawyers know how to draft and submit discovery requests, and also know what to ask for in those requests. However, parties who are representing themselves can also submit discovery requests to the opposing party.

Family court cases are often won or lost because of the discovery process. If a party fails to respond to discovery, the party can be defaulted or prohibited from presenting evidence. Sometimes the information a party needs to prove his or her case is in the hands of the other party, and can only be obtained through discovery. Many parties in family court don't understand the discovery process, don't use it, and don't take it seriously.

Nuts and Bolts of Discovery

For much more information about discovery, why it is so important, and how it is done, see our section in Chapter 10 on *Using Discovery to*

Bolster Your Case and Get a Preview of the Other Party's Case.

Default: Parties who fail to participate in the court process as required may forfeit their right to be heard, to present evidence, and to ask the court to rule in their favor. The term that most courts use in referring to that situation is default. A party can be declared in default for many different reasons, all based on the party's failure to do something required by the court. The ones seen most often in family court include:

- A party's failure to respond at the beginning of the case to the summons will result in a default in some courts. Read the summons and complaint carefully.
- A party's failure to come to the court for a required hearing or conference can also trigger a default. Pay attention to court notices and put the dates of court events on your calendar so you don't forget.
- A party's failure to respond to discovery requests on time or ever can cause a default against that party. Don't ignore discovery requests. Provide what you are being asked to, or, if you have good reason, object to some or all of the other party's discovery requests.

The consequences of a default depend on two factors, generally: how significant is the party's failure to do what is required and whether the party that has failed to follow the court's requirements is the plaintiff (the party who started the case) or the defendant (the party who has been taken to court).

Some examples of what are and are not significant failures: Being a day or two late in responding to discovery requests is not good, but the court probably will not impose a heavy penalty (and may do nothing at all) in response. On the other hand, a party who fails to respond at all to discovery requests may be defaulted and prevented from contesting the other party's position in the case. Being a little late to a court hearing or conference probably will not trigger any penalty (especially if you call ahead to the clerk's office), but a party who does not show up at all to an important conference or hearing will likely be defaulted and may lose the entire case.

Which party is in default makes a difference as to what action the court takes. If it is the plaintiff who is declared in default, the entire case may be thrown out of court, unless the defendant has filed a counterclaim against the plaintiff, in which case the court may give the defendant what the defendant is asking for in the counterclaim. If

it is the defendant who is declared in default, the defendant may be prevented from contesting the plaintiff's case, and the court may give the plaintiff everything the plaintiff is asking for.

Pretrial Proceedings: Sooner or later, every family case will come to trial if it is not resolved by agreement, or by the default of one party or the other. Before the trial is held, courts will schedule what is called a pretrial conference. The purpose of a pretrial conference is to make sure everyone—the court and the parties—understands what the trial will be about, including what issues will be addressed, which witnesses will be called, and what documents will be presented. Pretrial conferences are extremely important in contested cases, because they define what the court will be asked to decide. A party who fails to show up at the pretrial conference may lose the opportunity to present evidence or to contest particular issues.

If you have a lawyer, you may not need to go to a pretrial conference; your lawyer will take care of it. However, if you are representing yourself, you must go to the conference. And you must go prepared. Parties (or their lawyers) must come to a pretrial conference with a clear and specific idea of what is intended to be presented in court, in terms of what issues will be contested; what witnesses (if any besides yourself) will be asked to testify; and what documents are intended to be presented. At a pretrial conference, the following topics are likely to be discussed:

- *What issues will be addressed at the trial.* This may be the most important area where preparation is needed, because if the court is not told that a particular issue is contested, then it may not allow any evidence on that issue to be presented at the trial. Negotiations between the parties should take place before the pretrial conference, especially if there has been no mediation, to narrow the range of issues in dispute. In divorce cases and cases in which the parties have children but have not married, the issues at trial often center on the children—where they will live, how much time they spend with each parent, and also how decisions about the children will be made—as well as on property to be divided and issues of alimony. When there are no children, contested issues usually center on property to be divided and on alimony. Sometimes there is an issue about how property (such as a business) should be valued, or what level of income should be assigned to a self-employed spouse for alimony purposes.

- *What witnesses each party will have testify at trial.* It is usually not essential that you know exactly who your witnesses will be, but you

should be able to estimate how many witnesses (including yourself) you might present. Sometimes the pretrial order will list the names of witnesses based on what the judge is told at the pretrial conference. Usually, the pretrial order will allow each party to add other witnesses, but will set a deadline for doing so. A typical requirement is that the other party must be notified of any additional witnesses within a certain number of days before trial.

- *What exhibits each party intends to ask the court to consider during the trial.* Exhibits are usually documents but can also be objects like computer disks or photographs. Each party is expected to provide the other party with a copy of all of the exhibits the party will be submitting to the court.

- *How long the trial is estimated to last.* Courts usually schedule trials in specific slots, so it is important for the parties and their lawyers to be reasonably accurate in estimating how many witnesses will be called to testify and how long the trial will take. Some judges will actually keep track of how much time each party has used during a trial, to make sure that the trial does not run beyond the allocated time and that each party is allowed the same amount of time.

Many courts schedule trials back to back, so it is vital that the court know whether the trial will last an hour or a week or something in between. Most family court trials are over in a day or less, and some last less than an hour. However, a case with many contested issues, or a case with many witnesses on a few contested issues, may take days to try. Even lawyers are notoriously bad at estimating how long trials will take, so don't worry if you feel unable to come up with a very exact estimate.

Your estimate of time need only cover your part of the case. Just visualize yourself and your witnesses presenting what you will want to cover, and be prepared. When you give the judge your estimate, make it clear you are estimating only how long your own presentation will take, and are not including the other party's time in your estimate. By putting together what both you and the other party say, the judge should have a good sense of how long the entire trial will take.

The other important element of a pretrial conference is for the court to set deadlines before trial. There are likely to be deadlines for providing the other party with a written list of your witnesses and exhibits, and there may be other deadlines. Take the deadlines seriously—parties who miss the deadline for listing witnesses and exhibits sometimes find themselves being prohibited from presenting

evidence at the trial. If you don't understand a deadline, or what it is you are expected to do by the deadline, ask the judge. If you forget to ask the judge, ask the clerk.

Most courts follow up the pretrial conference with a report often called a pretrial order. In many courts, pretrial orders recap what was discussed at the conference—the issues to be presented at trial, the deadlines falling before trial.

The Chess Clock

Some lawyers are notorious for going well beyond their pretrial estimates of time once the trial begins. Usually this is a sign of poor planning or incompetence; other times, it is a deliberate strategy to “run out the clock.” The judge will try to make sure that each party gets a fair share of the time allocated for the trial. However, if the judge does not seem to be focused on this you should not hesitate to ask for a conference to discuss it. One of our colleagues has a “chess clock” in his chambers. This device has two clocks, which are alternately engaged by hitting a switch. It's easy to see how much time each side has used. In contentious cases he brings this onto the bench to time each lawyer's use of time. It's not a bad idea—I've borrowed it!

— J.D.K.

After hearing from the parties at the pretrial conference, the court may issue a pretrial order that defines the procedure for the case to come to trial. (Some courts have other names for pretrial orders). The purpose of the pretrial order is to make sure that the trial will be presented fairly and efficiently. Pretrial orders often set deadlines for each party to notify the other and the court about what witnesses and documents the party will be presenting at trial. A party who misses the deadlines in a pretrial order may lose the right to present evidence at the trial. It is therefore very important to read the pretrial order carefully and to meet all the deadlines.

Scheduling for Trial: After the pretrial conference, the next step in a family case usually is for the case to be called to trial. There may be a wait of weeks or months, or even longer. Usually the court clerk can give you some idea of how long the wait will be.

Keep track of the deadlines contained in the pretrial order for notifying the other party about witnesses and documents you will present at trial. If the deadlines are stated in terms of specific dates, put them on your calendar. Often a pretrial order will state the deadline in terms of days before the trial—for example, “The parties

shall exchange lists of witnesses and exhibits 14 days before trial.” Either way, take care of what you need to as soon as you can, so you don’t run afoul of the deadlines. Also, if you are under an obligation to update your responses to discovery requests by the other party, don’t forget to do so. If you have made discovery requests to the other party, ask for an update of any incorrect or out of date response.

Scheduling of cases for trial varies greatly from court to court. Usually, when a case is ready to go to trial, the case takes its place in line on what may be called the “trial docket” or “trial calendar.” Cases awaiting trial move up the list over time until they are at the front of the line and the court clerk schedules them for trial. Some courts schedule cases for trial one at a time, on assigned days. Other courts issue lists of cases that can be called to trial at any time in a given period of time, measured sometimes in weeks or even months. (This system is often referred to as a “trailing docket.”)

The parties and lawyers in trailing docket cases are expected to be ready to go to trial when the court is ready to hold the trial. Needless to say, waiting in a state of constant readiness to be called into trial can be extremely inconvenient and quite stressful. Usually, the clerk can give the parties and lawyers a good idea of when their cases will actually be called in for trial. If parties will have to travel a long distance to get to court, courts sometimes agree to give a week’s notice.

You should be ready to go to trial on very short notice. Even if the clerk tells you your case is far down the list of cases to be called in for trial, the cases ahead of yours may evaporate quickly. In some courts you may get a call from the clerk directing you to report the next day, or even later the same day. So *do not, repeat, do not* wait for that call before getting organized and ready for trial.

Thirteenth on the List

As a practicing lawyer before becoming a judge, I once was handling a case that was thirteenth on a trailing docket case that was set to start on a Monday and last for two weeks. There were twelve cases ahead of me, and these cases were estimated to take more than two weeks to try, so the likelihood was that we wouldn’t be called in at all, or at least not until late in the trial period. On the Friday afternoon before the list was to begin, the clerk called me and said “We’ve been told all of the twelve cases ahead of you have settled. The judge wants you here Monday morning at nine, ready to go.” As you might expect, that was a long weekend in the office.

— J.D.K.

If you have a lawyer, the court will likely send the notice of trial to the lawyer, who is expected to send it to you. Make sure your lawyer knows how to reach you! If you are representing yourself, the court likely will send you the notice directly. Make sure the court clerk knows your mailing address! Either way, read the court's notice carefully. Also, check your pretrial order right away regarding deadlines for notifying the other party of who your witnesses are and what documents or materials you will be submitting.

If the timeframe the court has in mind will create a problem for you or an essential witness, you may need to ask for a continuance. If you have a lawyer, the lawyer will take care of filing the motion for continuance, but you obviously need to let the lawyer know of your problem as soon as you can, so the motion can be filed promptly. The court notice may contain a deadline for continuance requests to be made, and if you miss the deadline, you may not get the postponement you need. There is no guarantee you will get it anyway, particularly if the other party objects to your request, or if you have already been granted one or more postponements of the trial.

Trial Preparation: For some time, you (and if you have one, your lawyer) should have been preparing for trial at least in terms of knowing what issues you will raise, what witnesses you will present and what documents you will be submitting. Once the court notifies you of when your trial will be, you have to go into high gear. [\[21\]](#)

If you have a lawyer, your lawyer should be in touch with you before the trial regarding what you need to do ahead of time, and also on what areas your testimony will be covering in court.

A thorough lawyer will meet with you before the trial for as long as it takes to go over what you will testify to, what your witnesses will cover, and also what you and they may be asked on cross-examination by the lawyer for the other party. A thorough lawyer will have an outline of the areas you and your witnesses will cover in testimony, and a list of the documents that you and other witnesses will be shown during testimony. The lawyer is not going to coach you or try to shade your testimony, which of course will be under oath and subject to penalties for perjury. On the other hand, your lawyer can and should help you go over dates, names, events and documents so that you will be able to testify fully and accurately at trial. Your lawyer can also help you prepare for questions from the other party's lawyer.

You can help your lawyer develop questions, not only for you and

your own witnesses, but also for the other party and the other party's witnesses, when your lawyer cross-examines them.

An essential part of getting ready for trial is for both parties to make a last-ditch effort to resolve their differences without a trial. The trial judge will expect parties who have lawyers to explore settlement before coming to court for trial, and may be very unhappy if no settlement discussions have taken place. Even if you and the other party are not able to agree on everything, you should try to narrow your differences.

Most divorces and other family cases involve more than a single question or issue, and that creates opportunities for give and take when it comes to settlement.

Cross-Examination: Less is More

You may want to punish the other party by going after them (or having your lawyer go after them) during cross-examination. Resist that temptation. Cross-examination is like a live hand grenade—it has to be handled carefully or it may go off in your face. Also, the purpose of cross-examination is to help your case, not punish the other side. If you are committed to punishing the other side, the best way is to present your own case as effectively as possible.

Lawyers and judges know that less is more when it comes to cross-examination.

The “Perry Mason” moments when a witness breaks down and confesses almost never happen in real life. Usually, it is the opposite—an unfriendly witness who is cross-examined at length will take the opportunity to repeat damaging testimony or even do more damage than the witness did during questions from the other party's lawyer. Lawyers are trained not to ask any question on cross-examination that they do not know how the witness will answer, but they often forget that part of their training in the heat of a trial.

A famous and probably fictional story makes the point well:

At a criminal trial at which the defendant was facing a charge of biting off another man's nose in a barroom brawl, one witness for the state testified that the defendant had committed the dastardly act.

Listening carefully, the defendant's lawyer noticed that the witness never actually said he saw the defendant bite off the nose. So when it came time to cross-examine the witness, the lawyer was ready.

“So,” the lawyer said. “You never actually saw the defendant bite off anyone's nose?”

“That's right,” said the witness.

At this point, the defense lawyer should have stopped and sat down, but he asked that one question too many: “Well then, how do you

know my client bit off the nose?"

"Because I saw him spit it out."

— A.M.H.

A "Perry Mason" Moment

I presided over the trial of a divorce case in which one of the hotly contested issues was which party would be awarded possession of a cat. Pets are considered property. Both husband and wife claimed the cat was theirs, not the other's. Both claimed to love the cat. Both claimed to be the primary caregiver for the cat. Both claimed it was in the best interests of the cat for custody to be awarded to him or her. (There was no guardian ad litem for the cat to help me decide). The Perry Mason moment came when the wife's lawyer cross-examined the husband. The wife's lawyer asked the husband if he knew whether the cat was a male or a female. The husband couldn't remember. I awarded the cat to the wife.

— A.M.H.

Trial: Any family case that is not resolved will go to trial eventually, as long as neither of the parties has been defaulted for failing to follow some significant court requirement. Trials normally involve the presentation of evidence to the court by both parties. Evidence usually consists of testimony under oath by the parties and often other witnesses, and the documents and other materials accepted by the court as part of the evidence. Documents and other pieces of evidence are usually called exhibits. What areas are covered at the trial normally are defined by the pretrial order, which is why it is so important for the parties to pay close attention to the pretrial process and the pretrial order.

One important aspect of any trial is whether it is recorded in any way. Some courts use electronic recording through audio recording equipment; others use court reporters; still others use equipment that makes both an audio and a visual recording. Some courts record trials automatically; others do it only on request. The primary reason why a party might want a trial recorded in some way is for purposes of appeal. If neither party intends to appeal whatever the trial court ruling proves to be, there is little reason to request that the trial be recorded. In some cases, there is definitely going to be an appeal by either or both parties, depending on how the court rules. In those cases, the party who appeals likely will need to present the appeals court with a transcript of the trial to enable the appeals court to review the trial court rulings in any meaningful way. Without a transcript based on the verbatim trial record, appeals are limited to rulings on matters of law, and the appeals court is likely to assume

that there was enough evidence to support the trial court decision.

If recording of trials is not automatic in your court, be sure that you make (or that your lawyer makes) a written request for a recorded trial within whatever deadline the court has set. Otherwise, your chances of succeeding in an appeal, if you lose at trial, drop significantly.

A trial usually begins with the judge going over the issues that will be addressed, discussing any scheduling problems involving witnesses, and addressing any contested issues about evidence that either party intends to present. If both parties have lawyers, this initial discussion may be in the judge's office (called chambers). Otherwise, it will be in the courtroom.

The next phase of the trial may be the presentation of introductory statements by the lawyers for the parties, or the parties themselves. The purpose of these statements is to give the judge a preview of what each party expects the evidence to be, and of each party's position on the issues the court has to resolve. Often, if the judge appears to have read the court file and has a grasp of the history of the case, the lawyers and parties will dispense with the introductions and move right into testimony.

Evidence at a trial consists of the testimony under oath of witnesses and any exhibits (meaning documents and tangible things) submitted by either party and accepted by the court into evidence.^[22] Every court has rules on what can and cannot be accepted into evidence, usually called the rules of evidence. The two basic limitations on evidence are called "the hearsay rule" and "relevance."

Hearsay is second-hand information and is normally not allowed to be presented as evidence. This means that witnesses will usually not be allowed to repeat information based on what others have told them or what they have read, and are limited to discussing what they actually saw and heard. As to exhibits, the hearsay rule can mean that documents containing hearsay information, such as police reports and witness statements, cannot be accepted into evidence.

Relevance means that the information has to have some bearing on an issue in the case, meaning that the information helps prove one side of the issue or the other. Information that does not bear on any issue is not relevant, even if it is interesting or even lurid.

Judges vary greatly in terms of how strictly they enforce the rules of

evidence. In cases where there is no jury (meaning the vast majority of divorces and other family cases), judges are likely to be more flexible (or even lax) about enforcing rules of evidence, believing that they can sort out what evidence should be considered and what should not, without excluding it totally from any consideration. In family cases, particularly those involving decisions about the best interests of children, judges often feel an affirmative duty to get enough information to make good decisions, and therefore do not strictly enforce the rules of evidence.

The plaintiff ordinarily presents evidence first. The plaintiff's presentation is called "the plaintiff's case-in-chief." All of the plaintiff's witnesses testify under oath, and each can be cross-examined by the defendant after the plaintiff has finished questioning. When the plaintiff has "rested," meaning that the plaintiff has finished presenting evidence for the time being (bearing in mind that the plaintiff may present rebuttal evidence in response to the defendant's evidence), it is the defendant's turn to present evidence. This is the defendant's "case-in-chief." Each witness for the defendant may be cross-examined by the plaintiff. After the defendant has "rested," the plaintiff can ask for the opportunity to present rebuttal evidence, meaning evidence that responds to the defendant's evidence and that could not have been presented during the plaintiff's case-in-chief. [23]

Judgment/Decree: The last step a family court takes is to issue a judgment, sometimes called a decree. The judgment is a written order that usually contains the court's final decision on all aspects of the case.

Appeal: Any party to a family case who is dissatisfied with the outcome has the right to appeal. Relatively few family cases are appealed, and most appeals are unsuccessful. Two reasons explain this:

- There are many procedural requirements for appeals that often defeat efforts to appeal. Normally appeals can only be taken from final decisions by the family court, and appeals sometimes are dismissed (or terminated) because they are premature. Even if the appeal is appropriate, every state has deadlines for filing an appeal, and the appeals courts tend to be stricter than trial courts about the deadlines. Missing an appeal deadline even by a day can doom the appeal. In every state the party pursuing the appeal has to file a brief outlining the reasons for the appeal, and the appeal is usually dismissed if no brief is filed.

- An appeals court's review of the family court decision is usually limited to two areas: was there any evidence to support the family court's decision on questions of fact, and did the family court make any error of law? To succeed, an appeal based on lack of evidence usually must include a transcript of the testimony at trial, and transcripts can be very expensive. The family court's decision on contested questions of fact will be upheld if there is any evidence to support it. An appeal is more likely to be successful if the appealing party can show that the family court made a mistake in interpreting the law, or in applying the law to the factual situation presented in the case. This can be difficult to do without a lawyer to help analyze the law and present the arguments for why the trial court made a mistake.

On the other hand, if you have a strong objection to the court decision, or if you will have great difficulty living with the decision, you may not have much to lose by appealing, except for the cost and effort involved in the appeal. If the appeals court agrees with you, it can overturn the family court judgment from which you have appealed and send the case back to the trial court. An appeals court's decision sending the case back to the lower court is called a "remand." If the appeals court decides that a new trial is necessary, it can remand the case for that purpose. It can also remand the case, not for a new trial, but with a directive that the lower court change its judgment.

Post-Judgment Activity: In family cases, it is extremely common for the parties to the case to come back to court after the court has issued the judgment. There are three primary reasons why people come back to court after the case is over: to modify, enforce or clarify a family court judgment.

- *Modify:* Either or both parties may ask the family court to change the judgment, if there has been a change in the situation. Most of the changes requested in family courts involve children or alimony. Sometimes one party or both decide that there needs to be a change in where the children reside, or in how much child support is paid. Sometimes one party is moving to a distant state, and the custody and visitation schedule that was ordered in the family case judgment needs to be changed. When the parties in a case involving alimony come back to court, it is usually because one party wants alimony increased or decreased.

- *Enforce/contempt:* Another reason why family court cases return to court is that one and sometimes both parties are claiming the other

has not obeyed the family case judgment. Examples include claims of not providing court-ordered visitation, not paying child support as ordered, not paying alimony as ordered, not deeding over or selling a home or other real estate as ordered, or not turning over personal property as ordered. In most states, the main procedure for making someone obey a judgment involves seeking an order holding the person in contempt and forcing them to obey or suffer consequences such as going to jail or paying a fine. Sometimes the parties interpret the judgment differently, and each claims the other is not obeying the judgment. In cases where there is a legitimate disagreement about what the judgment means, or what it requires, the judgment may need to be clarified before it can be enforced.

- *Clarify*: Sometimes the family court judgment is not clear about what the parties' rights are, and sometimes a judgment just fails to speak to a particular question that the parties need resolved.

Every state court system has different rules on how to modify, enforce, and clarify a judgment. [\[24\]](#)

Who's Who at the Court

To understand how your family court works, you need to learn about the participants. This section not only introduces you to the court clerks, judges, lawyers and others, but helps you see the court process from their point of view. Understanding their concerns and viewpoints will help you navigate the court process more smoothly and knowledgeably.

The Court Clerks

Every court has a clerical staff, usually called the clerk's office, with the person in charge usually called the clerk. Other staff members may be called assistant clerks or deputy clerks. Some courts call these staff members case assistants. Depending on how many cases the court handles, the clerk's office may consist of anywhere from one to more than a hundred employees. Clerk's offices are normally open on days when the court is in session, and may be open also on other weekdays, even if court is not being held.

A court clerk's office handles four essential functions for the court:

- *Filing*: Every court case has its own file, in which all of the papers, correspondence and other materials sent to court by the parties are kept. The court file also contains a copy of all notices and orders sent to the parties by the court. In some courts, the file may be entirely or

partly maintained electronically on computer instead of on paper. Such courts may also allow, or even require, the parties to file papers electronically instead of on paper. With a few exceptions, court files are public, so go to the clerk's office if you would like to review the court file on your case or on another case.

- *Information:* The clerk's office is your main source of information about the court, and also about court-related services. For example, most clerks' offices provide to people planning to represent themselves with handout materials describing family court procedures. You also can get information on low-income legal assistance and shelters, services for victims of abuse, and other services. Clerks' offices usually cannot provide you with legal advice, although they are good sources of legal information. This means that the clerk's office can explain the court process and provide you with information about it, but they generally cannot help you decide how to handle your case. Thus, the clerk can help you file a case and fill out the court papers, but cannot advise you on what to ask for or what position to take on what the other party is asking for.

- *Communication:* All contact between the court and the parties and lawyers involved in a court case goes through the clerk's office. The parties and lawyers should not initiate any contact with judges directly. Most clerk's offices use e-mail or fax, in addition to letter and the telephone, to communicate with the parties and lawyers involved in a case. Most courts send out their orders and scheduling notices by regular mail to the lawyer for a party, or directly to parties who are representing themselves. If you have a lawyer, the court usually will not contact you directly—your lawyer is expected to keep you informed of court events and is expected to send you copies of court orders, notices and other papers. If you don't have a lawyer, the court will contact you directly. It is therefore very important to make sure the court clerk has your current mailing address and telephone number.

- *Scheduling:* In most courts, the judge, in consultation with the court clerk, designs the court schedule in general terms, meaning in terms of which types of cases will be scheduled on which days. For example, a court may schedule family cases for certain days of each week or month, and criminal cases and other types of cases on other days. A court that handles only family cases might schedule cases for conference on some days, and cases for actual trial on other days. However, in most courts, judges are not involved in deciding which particular family cases will be scheduled on the available days. It is usually the clerk's office that decides which case will be scheduled at

which day and time, working from a list of cases.

Keep the Court Clerk Up to Date on How to Contact You

Every day people lose their cases in court because they have not given a current address and telephone number to the court clerks or to their lawyers if they have lawyers. Court cases move ahead, slowly sometimes but steadily, with or without the people involved.

When a case is scheduled for trial or other important events, the court clerk sends advance notice in writing to the lawyer for each party, or directly to any party who does not have a lawyer. Sometimes people move away and do not give any new contact information to their lawyers or the court clerks, so they never are notified of the upcoming trial or court event. Most judges do not believe the court process should be halted in its tracks simply because parties forget to tell the court or their own lawyers how they can be reached.

If the court clerk or your own lawyer does not know how to contact you, your case may come to trial without your knowing it. If you don't show up, the judge likely will throw out any claims you have against the other party, for "lack of prosecution" (meaning you did not show up to pursue your case). If the other party shows up ready to proceed, the judge also may default you (meaning you lose because you did not show up to defend yourself) and award the other party what that party is looking for against you. If that seems unfair, remember it is your responsibility to make sure others know how to contact you—your lawyer if you have one, the court clerk if you don't.

Many court systems are under-funded and overburdened, meaning that the clerk's offices are very busy. In handling your questions and requests, the best clerks will make you feel as if your case is the most important case in the court, but in fact it is only one of hundreds or thousands of cases. Here are some suggestions on how to deal with court clerks:

- Be prepared with questions and information, so that you use the clerk's time efficiently. When you approach the clerk's counter, have in mind what it is you need to know or need to say.
- Don't ask a lot of questions when a little homework on your part would answer them. Clerks don't have time to answer lots of questions. Do your own homework on what you need to know. For instance, instead of asking a clerk to educate you about the court process, ask if there are any materials on family court available for you to review.

- Make copies ahead of time. If you file any document with the court, whether a letter or a court paper or a piece of evidence, you must send a copy to the other party and you should keep a copy for yourself. Make these copies ahead of time. You can ask the clerk's office to make copies for you, but they usually cost much more than the local photocopy place or post office copier will. Plus you have to wait much longer, because you cannot expect the clerk to drop everything else and make your copies immediately for you.

Be Nice to the Clerk

People who have cases in family court often feel frustrated, upset or angry for various reasons. Many of them take their feelings out on the court clerks, even though whatever is causing the problem is often not the clerk's fault. If you are unhappy with the judge's decision in your case, don't take it out on the clerk. Even scheduling problems are often not the clerk's fault—it is usually a judge who decides whether to postpone a court hearing, not the clerk. Court clerks are used to dealing with unhappy, angry and sometimes unbalanced people, but it doesn't mean they enjoy it. Be nice to your court clerk—don't make her or his job any harder than it already is.

Being nice is not only the right thing to do, but it has practical advantages. Clerks can be very helpful, and are more likely to want to be helpful if they are treated with respect. Also, clerks talk to judges all the time. It is not uncommon for a clerk who has been treated badly by one of the parties or lawyers in a case to tell the judge about it. The judge will not and should not consciously take this kind of information into account in making decisions in the case because it is outside the evidence, but the bad impression of the party or the lawyer remains, and it may affect the judge on a subconscious level. Please review the quote at the beginning of this chapter. Both of us speak regularly to meetings of lawyers, and both of us regularly remind the lawyers to be nice to the clerks and to the secretaries of other lawyers. The assistant court clerks and the legal secretaries really run the world of law and the courts. If you alienate them, it will come back to haunt you one way or the other. Plus, you should be nice anyway!

Court Marshals/Security Officers/Bailiffs

Court security is an increasingly important feature of modern American courts. Security is of special concern in family courts because of the intense emotion and conflict often involved in divorces and other family cases. Many courts perform entry screening for weapons, and many employ armed security officers to protect the participants in the court process. Court security officers used to be

called bailiffs, and still are in many courts. Sometimes they are retired police officers, although court security is becoming a career path, particularly in urban or larger courts. In addition to handling security, some court security officers help with paperwork in the courtroom.

A court security officer's main concern is that no one is put at risk anywhere in the courthouse, particularly the judges and court staff who may be most at risk of attack. In the courtroom, this means that none of the parties or lawyers can come up to the judge, or hand the judge anything directly. Court security officers also expect people to show respect for the court, for the judge and for each other. This may mean that hats come off, chewing gum is discarded, hands come out of pockets, and so on. Some courts have a dress code and the court officers enforce it in the courtroom.

In family court, the most common security issue involves conflict among those involved in a case. Inside and outside the courtroom, court security officers often have to intervene in arguments and confrontations, sometimes involving physical contact, between the parties to a family case, or between the family and friends of the parties.

Make sure your witnesses and support people know the ground rules. Court security officers know it isn't always the parties to a family case who cause problems, but the parties' current spouses, boyfriends, girlfriends or their parents, friends and other support people who get into altercations with their opposite numbers. It's fine to bring people with you to court, to serve as witnesses or just to support you, but make sure they behave themselves, because it may reflect badly on you if they don't.

Here are some pointers on how to avoid problems with court security officers:

- Follow courtroom protocol: Every court has a protocol or ground rules on how people are expected to behave in the courtroom. Most of the ground rules are based on common sense. For example, all courts expect the parties in family cases to act and speak with courtesy and respect for other participants. Beyond the basics, different courts have different rules and expectations, often unwritten, on how to conduct yourself. Some courts have requirements on how to dress, or particularly on what not to wear to court. If you aren't sure what is expected, either ask someone or come to court early and observe the judge, the clerk, the lawyers and others involved in the process.

- Avoid altercations: If you can't have a civil, respectful conversation with the other party (or anyone else for that matter), avoid interacting with that person.

The Courtroom Code of Conduct

Perhaps the most important ground rule in every court is to speak and act in a way that shows respect for the court and for all of those involved in the court process. Everyone has to follow that rule—the judge, the court staff, the lawyers, the parties, the witnesses, and the courtroom audience—no exceptions.

Showing respect in the courtroom means much the same as it does anywhere else. Among other things, it means speaking truthfully, listening when spoken to and responding when asked, and avoiding demeaning, intimidating or disrespectful words, tone of voice, gestures, facial expressions and body language.

Beyond these basics, different courts have different rules and expectations. Sometimes courts have written down their ground rules for the benefit of people representing themselves in court. Ask your court clerk if your court has anything available in writing. One way to learn what is expected, and at the same time increase your level of confidence and comfort in being in court, is to sit and observe a court session, preferably one involving the judge who is involved in your case. Most court proceedings are open to the public. In some courts, family court cases are not open to the public, so you may need to observe some other type of court case.

Here are some common examples of court protocol:

Dressing for court: It is always a good idea to behave in court in a way that shows you take the court process seriously, that includes how you are dressed. Judges don't expect formal wear or high fashion. Judges also understand that not everyone can afford to dress in business attire. On the other hand, judges occasionally encounter people who show up in what appear to be bathing suits, pajamas, especially revealing or provocative clothing or other attire that suggests they either do not know or do not care what courts are all about. If you expect to be taken seriously in court, dressing in a way that shows you take the court seriously is always a good start. Some courts have dress requirements, for example, that prohibit people from wearing revealing clothing or T-shirts that display offensive slogans or images. Some courts prohibit political buttons from being worn in the courtroom. Some judges have sent people home because of their attire. Good judgment is your best guide. You cannot go wrong coming to court dressed as if you were going to a job interview.

Turn off your cell phone and put away your newspaper, magazine or

laptop. Courtrooms are not airports, bus stations or libraries. If you are seen reading, texting, typing or talking on the telephone, the court officer (bailiff) may ask you to leave the courtroom or even confiscate your electronic device.

Judges, Magistrates, Masters and Other Judicial Officers

Family courts across the country all have judges, but beyond that courts differ greatly. The judges may not actually be called judges—sometimes they are called magistrates, masters, or referees. Whatever their titles, judges, magistrates and other people who make the decisions in family cases are called judicial officers, because they exercise the authority of a judge in deciding contested issues in court cases. Judicial officers, such as magistrates and masters, often perform a more limited function than judges. In some courts, they do not wear the black robes of judges, and may have authority only to deal with specific issues.

How to Address Judges and Lawyers

Speaking to the judge: “Your Honor” is the standard way to address a judge. Some judges expect you to stand up when speaking to them, but some will let it go if you don’t. The court security officer may bark at you if you forget to stand up. If you are obviously unable to stand up due to disability, don’t worry about it. But if you need to be seated while speaking to the judge for health reasons, or in order to refer to papers on the table, we advise you ask the judge for permission to remain seated. Most judges appreciate being asked, because the request shows respect for the court, and most will readily agree.

Speaking to opposing parties or lawyers: One important ground rule is to avoid getting into arguments with the other party or the other party’s lawyer. In fact, not speaking to them directly during the trial (unless you need to whisper a question or request) is a good idea. The etiquette for lawyers during a trial is that they do not talk to each other directly but address each other through the judge (except for whispered consultation outside the hearing of the judge). For example, instead of a lawyer saying, “Please show me what you are going to hand the witness,” it is considered good courtroom form for the lawyer to say, “Your Honor, I ask that opposing counsel show me the document he plans to hand to the witness.” You may not need to be so formal, but you should always refer to the other party and the other party’s lawyer in civil terms, such as “Attorney Jones” or “the plaintiff,” not as “that one” or “that @#\$\$%^&.”

If you want to give something to the judge, give it to the clerk or

court officer rather than trying to hand it directly to the judge.

For simplicity, we use the term “judge” to refer to any judge or other judicial officer.

Some judges are full-time and some are not. Some judges are elected and others are appointed. Some judges specialize in family court cases, whereas others handle a wide variety of court cases—such as civil and criminal, real estate and personal injury cases—along with family cases. Most judges are lawyers, meaning that they have graduated from a law school and have practiced law before becoming judges, but some are not lawyers.

Your court clerk is likely to have information on the judicial officers who serve in your court, and your state’s court website might also have information explaining who does what in your state’s family courts. It isn’t necessary for you to research your judicial officers, but you might find that research helpful in understanding the court process.

You may or may not be able to find out ahead of time which judge will be handling your case. Some courts assign the same judge to a case from start to finish; in other courts, you may encounter different judges at different phases of your case. You can always ask the clerk which judge is assigned to your case. Don’t be surprised or upset if the clerk refuses to tell you—some courts have a policy against revealing which judge will be hearing a case ahead of time, to discourage judge-shopping.

Inside the Mind of the Judge

Your goal in court is to persuade the judge to adopt your position rather than the other party’s position on contested issues. To persuade the judge, you need to focus on what the judge is interested in or looking for, and avoid what the judge is not interested in and not looking for. It sounds simple, but you would be amazed at how many people (including highly trained lawyers) never figure this out. This sidebar is intended to explain how judges tend to approach family cases, so you will be better equipped to address the judge’s questions and concerns.

The Truth, The Whole Truth and Nothing but the Truth: Probably more than anything else, judges are interested in the truth. Few things can hurt your case more than being caught in a lie. After that, the judge may not trust what you have to say. If there are some problems with your case or with you for that matter—whether they involve a criminal record or anything else that does not reflect well on you—it

is almost always best to acknowledge them up front. It is much better if the judge hears about these problems from you, as opposed to hearing about them from the other party. First, you get to define them in your own terms, and second, you get credit for being honest. Believe it when we say judges like to see honesty.

Time is of the Essence: Judges usually are very conscious of time. If the courtroom is crowded with cases waiting to be heard, the judge is not going to be patient with parties or lawyers who waste the court's time. Even if there are no other cases waiting, the judge likely has a limited amount of time set aside for the case. What this means for parties and lawyers is they need to focus on the issues, avoid digressions and cover what they need to expeditiously.

Some judges put time limits on trials or other proceedings in court. The purpose of these time limits is to be sure the judge allocates time fairly among the various cases waiting to be heard. If the judge has ten cases to deal with in the space of two hours, the judge cannot allow the first case to use up all or even very much of the time available. It never hurts to ask the court clerk or the judge how much time you have to cover what you need to, but if you are given a time limit, stick to it!

Focus, Focus, Focus: Judges much appreciate parties and lawyers who get to the point and stay on it. Staying focused and using time efficiently obviously are related. Staying focused means knowing what the issues are in the case; knowing what you need to cover on each of those issues; knowing where you are going with your questions; having a good reason for each question, each document submitted, and each objection to a question or document. One sign of parties (and for that matter lawyers) who don't know what they are doing is that they are not focused. They use a "kitchen sink" approach because they cannot distinguish between what is important and what is not.

R-E-S-P-E-C-T, That's What I Want: We discuss courtroom etiquette elsewhere in this chapter, but it never hurts to remember that every judge likes to see the court treated with respect. We also like to think that every judge is as likely to show respect to others as to insist upon it from others. Projecting respect is not only the right thing; it is the smart thing, in court like anywhere else.

If you do know which judge will be handling your case, it may be helpful for you to watch that judge in action by visiting the courtroom while court is in session. That observation will help you assess the judge's style in terms of courtroom protocol. You may also get a feel for the judge's approach in dealing with family cases.

In nearly every state, decisions in family cases are made by judges, not

juries. Texas and Georgia are the only states that allow jury trials in divorce cases.

Divine Fact Finding

Speaking of honesty on the witness stand, we can't resist telling a classic but true tale from a courtroom on the Maine coast.

The judge was hearing a motion to reduce child support filed by a lobsterman who lived on a local island. The thick court file contained several orders in which other judges had found that the lobsterman had been less than forthcoming about his finances during discovery and that his previous testimony had been highly suspect.

His lawyer called him to the witness stand, and the judge administered the usual oath: "Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth?" At the exact moment when the lobsterman said, "Yes"—zap—every light in the courtroom went out and the courtroom was left in near darkness, as the day was a Downeast winter afternoon. The judge recessed the case for a few minutes while the janitor reset the circuit breakers.

When the hearing resumed, the lobsterman began his testimony. Twenty minutes later, after carefully setting the stage about the lobsterman's business practices, his lawyer asked him whether he had ever sold any lobsters for cash and failed to record the sale in his tax returns. At the exact moment the lobsterman replied, "Never"—zap—every light in the courthouse went out, and there was darkness throughout the surrounding ten-block area for more than an hour. In light of what the judge considered was a bit of "divine fact finding," he urged the parties to settle.

How to Survive (and Maybe Even Succeed) in Court

To sum up, here is our top ten list on how to get by in court.

10. Pay Attention! Read what the court sends you; read what the other party sends you. Make sure the court clerk has a current address and phone number. Many people around the country are seeing their children less than they perhaps should or paying more (or getting less) child support than they perhaps should because they did not pay attention to the court process.

9. Keep Copies! Send Copies! If you give an important document to the court clerk, make a copy ahead of time. You may never see the document again otherwise. All filings have to be copied to the other party, and should so indicate.

8. Follow the Court Rules: Most courts have one set of rules that

applies to people representing themselves as well as people who have attorneys. If you have a case in court, you are expected to follow the same rules attorneys do, so you need to know what they are. Most court websites post the rules, and you can also ask the court clerk.

7. Stick with the Issues: Every case focuses on specific questions, whether they relate to child custody, or child support, or alimony, or the division of personal property. Know what issues the court intends to deal with and deal with them. Don't ramble, don't digress, and don't get submerged in minutia.

6. No Editorial Comments: Resist the temptation to engage in name-calling or other adolescent behavior with the other party. Judges tend to get very annoyed with people who use the court as a way to vent or retaliate against the other party. Stick with the issues.

5. Know Where You Are Going: Lots of people come into court and are not able to tell the court exactly what they are asking the court to do for them. Think through your position on every issue in your case and be prepared to justify it to the court.

4. Be Prepared: Lots of people come to court unprepared, maybe because they don't know where they are going. Floundering will get you nowhere. Focus will pay off. For instance, if you claim to be owed child support, be prepared to show the court a chart indicating exactly what was owed, what was paid, and what was not paid, and when. If you claim to have paid child support, bring the cancelled checks or money order receipts to prove your claim.

3. Be Open-Minded: The most effective family lawyers are the ones who are not so locked into their own perspective that they cannot see anyone else's. By being open to other opinions and viewpoints, they are better able to assess the strengths and weaknesses of a case, and thus to give better advice to their clients about whether to compromise in settlement or to pursue a case to trial. The same holds true for parties, whether or not they have lawyers or are representing themselves.

If you can listen nearly as well as you can talk, you will be able to see things from the other party's viewpoint and also from the judge's viewpoint. Being able to understand viewpoints other than your own will help you make better decisions about whether to settle your case or go through with a trial.

2. Keep Your Eye on the Big Picture and the Long Term: Too many

parties in family cases get so caught up in court battles that they lose sight of the fact that someday the court case will be over, and they will have to live with the aftermath of the court battle. So, they level horrendous accusations against each other with no or very little evidence to support their charges. They drag their children into the middle of their arguments, or send hateful messages to each other through their children, or force their children to testify against the other parent in court, leaving the children with what can be lifelong emotional scars. There is an obvious explanation for all of this—separating or divorcing from your partner can be an emotional ordeal, more painful and intense than almost anything else in life.

The fact that it's understandable how things can get nasty in a divorce case doesn't make it right. Remember, if you and the other party have children together, you likely will have to deal with each other on some level for the rest of your lives, or at least until your children are grown. Fight your court battles if you must, but unless you have no real choice, don't go beyond the point of no return, the point at which you inflict permanent damage on your relationships with others.

1. Show Up! If you do nothing else, show up in court. Be on time. Make sure you know which court you have to go to and where it is. Allow extra time to get to court so you know you will be there when your case is called. Otherwise, your voice will not be heard.

Chapter 9

The Dark Side

Twerps, Bulldogs, Sharks and High-Conflict Cases

“We will not prematurely or unnecessarily risk the costs of worldwide nuclear war in which even the fruits of victory would be ashes in our mouth...”

—John F. Kennedy, *on the*

Cuban Missile Crisis, October 22, 1962

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his chapter is written for people involved in high-intensity, high-conflict family law cases. In this book we have been consistently encouraging you to take the long view and the high road, and to act in ways that will encourage your partner to do the same. We firmly believe that the great majority of family law cases can be successfully resolved in this manner.

However, we are not so foolhardy as to believe that all cases can, or even should, be resolved so cooperatively. In fact, we spend much of our time and energy managing intractable cases at the tip of the conflict pyramid. Less demanding cases are usually sorted out and dealt with by others before they get to us for a full trial. High-conflict cases are really a completely different animal, with very different dynamics from the ordinary case; therefore, we have included this separate chapter about them.

So what do you do if you find yourself a willing or unwilling party to a case that is rife with conflict? Unfortunately, there are no magic wands or easy answers. Resolving your case will likely take lots of time, lots of emotional resilience, and usually, lots of money.

Assessing Motivations

As in our other chapters, we advise a careful assessment before deciding on any course of action. It is a truism in the investment world that the two forces that motivate people who invest in the markets are fear and greed. We believe that is true in many of these cases as well. So you will have to honestly evaluate whether your

partner is acting out of fear about losing money or the affection of his or her children, is trying to capture an unfair share of your joint assets, is attempting to alienate your children from you, or some combination of all of these things. If you can get a handle on your partner's real needs and motivations it may help you to figure out a path that will short circuit the conflict.

Similarly, a clear-eyed assessment needs to be made about your own motivation. Ask yourself whether you (or your lawyer) are driving or at least contributing to the conflict. Then, you have to assess whether your approach is objectively justified. Lastly, if you truly believe that the other team is being unreasonably intractable, you need to assess whether your partner is leading the charge, or whether your partner's lawyer is, or both. Depending on the answers to these questions, differing approaches may (or may not) work to get the process back on track.

Assessing why there is high conflict and where it comes from is perhaps the hardest of all assessments to get right. First, no one who is in the cauldron of a high-conflict case is operating at her or his highest and best level of functioning. You are operating in an environment that is unfamiliar to you, that has its own obscure language, and that operates by complicated and seemingly arbitrary rules. Second, you cannot help having been damaged by the emotional fallout from the end of your intimate relationship. Third, you have to deal with your own worries that this process may rob you of your children, or your savings, or both.

In sum, your judgment is probably not at its best. It is very likely that your subjective perception of reality is at least a little warped, and your perceptions of your partner's motivations and objectives may be significantly off base. We suggest the following steps:

- Write down the most honest assessment of the situation you can. Make no copies. Sleep on it. Revise it. Discuss your situation with the wisest mentor who is present in your life. Listen to what that person has to say. Revise your assessment.
- What are your conclusions? Who is driving the conflict? What are this person's motivations? Is there a legitimate reason to agree to some or all of what that person wants to achieve?

Now burn your assessment. Literally. *Burn it*. (This is OK, you are not destroying evidence, just your notes, which are your work product. However, never destroy records or other evidence.) If you were

honest, there is sure to be information in it you don't want others to know, and you especially don't want the other party in your case to try to introduce it as an "admission against interests" in court!

Who is driving the conflict?

If you honestly believe that *your partner* is driving the conflict, then it is more likely that an approach to an equitable resolution made through both of your lawyers will work best. While we admit that some lawyers are like sand in the gears of the justice system, most experienced lawyers really work more to lubricate the gears, and help parties to negotiate and bridge their differences.

If your assessment is that *your lawyer* is the one who is driving the conflict, you should have one good and honest talk with him or her to make clear that a highly adversarial stance is not what you want. If he or she can't or won't adjust to that approach, it's probably time to look for another lawyer. (If, in fact, a highly adversarial approach is the one you want, it's probably time to look for a different book.)

If your assessment is that *both lawyers* are engaged in the equivalent of an arms race, there may be a simple way to get them back on track. We have seen family cases and other kinds of litigation (including very large construction disputes) where one party has contacted the other directly, the parties have agreed to meet without lawyers on neutral ground, and have settled cases out from under their lawyers. (It is prohibited for one lawyer to contact an opposing party who is represented by another lawyer, and there can be severe consequences if that rule is broken, but there is no general rule that prohibits one party from contacting the other, so long as there is no restraining order, bail condition or other prohibition on such contact.)

If your assessment is that the *other lawyer* is driving the conflict, you have a very difficult situation to deal with. At least until or unless the time comes that your partner becomes dissatisfied with the job his or her lawyer is doing, there may be little you can do to change the dynamics, and you will have to cope with the other lawyer. This is one of the times when we say that you must have your own lawyer. We will talk about strategies for effectively dealing with an aggressive lawyer without unnecessarily making things worse, but we recognize that it is a hard line to walk.

In this situation, your lawyer will have to help you decide whether you are dealing with a twerp, a bulldog or a shark. *Twerps* are lawyers who are unnecessarily combative because they don't know any better,

or are afraid not to be. Often these are lawyers who are inexperienced, and who have absorbed the law school lessons about their obligation to be zealous advocates. They don't have the experience in law practice and in life to understand that assertive but reasonable lawyering is far more effective than mindless aggression. Many lawyers start out as twerps and over time grow out of it, but not necessarily within the lifetime of your case.

Unfortunately, some twerps mature into *bulldogs*. Bulldogs mean well and believe they are serving their clients' best interests. However, they don't have the necessary vision to understand the concept that they may win the battle (the divorce case) but that they (and the court) will ultimately leave your and your family's lives. By that point, while the lawyer may have "won" in the court, enough bitterness may have been generated so that it is you and your family who lose the war. Bulldogs want to win the case in the courtroom, where they are comfortable. The best thing that can be said about bulldogs is that they are honest and loyal. The worst part is that they honestly don't understand that the emotional wounds they help inflict can cause problems for years and years, sometimes even over generations.

The worst case scenario for lawyer-generated conflict is that your partner is represented by a *shark*. Sharks are lawyers who have all of the worst aspects of twerps or bulldogs, but who don't share their sincerity or loyalty. Many people think of most or all lawyers as sharks. At least where we live and work, this is far from the truth. At most, only a few of all of the lawyers in our courts fall into the "shark" category. Unfortunately, the bad reputations of those few color the public's view of all lawyers.

Sharks will say or do anything to win. They are tenacious and effective litigators who are willing to engage in the most detailed pettifoggery over minute details of discovery disputes, or the esoteric limits of the rules of evidence. If this were the whole story, one could perhaps understand, if not enthusiastically support, their litigation tactics. But what sets the sharks apart from the bulldogs is that their amorality extends to their clients as well. The worst types of sharks work vigorously until their client's money runs out, or their client's parents' money runs out, or until their client's friends' patience and money run out, and then, once the money is gone, move to withdraw from the case, leaving their former client broke, bitter, and high and dry.

All lawyers know who the sharks in the neighborhood are. (Sharks often do not have a high degree of self-awareness or self-monitoring.

They may have truly convinced themselves that their brand of lawyering is effective. They will not see themselves as sharks, but just as vigorous advocates. In fact, they may have convinced themselves that their approach is more “realistic” than that of judges or lawyers who think a more global view of the situation is better. Sharks will disagree with much of the advice in this book.)

Some very skilled lawyers we know double, or even triple, the retainer they will want from you if they know that your partner is represented by a shark. Unfortunately, there is usually little you or your lawyer can do to rein in the shark, and your partner may not recognize the unfortunate reality of his or her lawyer’s conduct until the money is gone, and the shark has moved on.

So, what do you do if you find yourself on the other side of this unfortunate equation? As previously noted, we do not suggest representing yourself in this situation. However, there has been significant academic research in the areas of game and negotiation theory done on what tactics work, or do not work. This research revolves around an exercise known as “the Prisoner’s Dilemma.” If you and your lawyer understand this theory, your strategy for dealing with the unreasonable opponent can be enhanced.

“The Prisoner’s Dilemma”—Game theory and Negotiation

In negotiation theory, a non-collaborative or “harsh” tactic is often referred to as an “X-move” and a more cooperative or “soft” tactic as a “Y-move.” Studies have shown that hoping for the best is not an effective strategy. If you begin a negotiation with a Y-move and your opponent responds with an X-move, and hoping for the best you respond with yet another Y-move, your partner will conclude that his or her X-move has been effective. This will encourage your partner to make further similar hard moves, and the likely result is that you will get steamrolled.

However an X-move responded to by another X-move may not be effective in reaching a resolution either, as it may cause a third X-move in return, leading to a cycle of escalating conflict.

The experts tell us that you should reply to an X-move with an X-move, but then follow it up fairly quickly with a Y-move before your partner has a chance to respond. If the response to your offer of a Y-move is a similar Y-move, then perhaps the cycle of moves is the beginning of an easing of the conflict as opposed to an escalation. However if your Y-move is followed by yet another X-move, then you have no choice in the short term but to respond with an opposing X-move and be explicit in explaining that you will respond to X-moves with X-moves. Then, again try a Y-move.

Negotiation theory predicts that after a couple of cycles of this, the opposing party will understand that you will not be intimidated, but also that a reasonable overture on their part will be met by a reasonable response on yours. Once negotiations shift toward that track, the case can begin to move toward resolution.

High-conflict cases

Sometimes particularly difficult cases are driven by an irrational partner, other times by an aggressive lawyer, and other times simply by the nature of the issues in play. Whatever the initial cause, if the cycle of reciprocal mistrust is not broken early it will solidify, and your case will be identified by the family court as a “high-conflict case.” *This is not a good thing.*

It is important to remember that most family cases are *not* high-conflict cases. If the disputes are not about children, a family business, or very complex financial circumstances, the case may be seen as “messy” or protracted. An ordinary dispute over finances is not likely to be viewed by the court system as a high-conflict case. There may be lots of pre-trial maneuvering, or “discovery disputes” (disputes over the type or level of detail of financial information to be exchanged), but the case will usually be resolved with no more than two contested hearings—one over interim support arrangements, and another over the final division of property and debt, and long-term financial support. There are not usually repetitive rounds of court hearings. (However, some alimony cases can generate successive rounds of motions to amend, and these can be true high-conflict cases.)

The Road not Taken

She locked him out of the house. He then cleaned out the bank accounts. She then called him and threatened he’d never see their child again. He then filed for a restraining order for verbal abuse (and later wound up losing the case). She then reported him to the child welfare authorities for spanking the child (and the authorities later found he’d done nothing wrong). He then...

What if he had sent her a check for half of the funds in the bank accounts before she had a chance to threaten to cut him off from the child? Maybe she would have just used the money to hire a lawyer to help her get the restraining order. But maybe the lawyer would have counseled her against going for the restraining order. Maybe she would have used the money to pay for expenses instead. We will never know, because neither party showed the other any willingness to back off.

— A.M.H.

While every high-conflict case is different in its details, there is a common underpinning. Whatever the original problem or source of the conflict was, that issue has been absorbed by and taken over by the conflict itself, which becomes self-reinforcing and self-regenerating. The most conflicted case either of us has been involved in, the family was almost continuously engaged in court for some fourteen years. During that period, a number of pre-judgment motions were filed, and then the actual divorce was tried. Later, a separate tort lawsuit was litigated between the parties for intentional infliction of emotional distress, and there were at least six separate rounds of post-judgment motions or protection actions, each of which spawned numerous sub-motions on procedural and technical issues.

Judges know that high-conflict cases can turn into repetitive cycles of virtually endless litigation, and it can be almost impossible for a judge to determine where reality lies between the two parties' widely divergent views of the situation. When this occurs, judges will use one or a combination of a number of different techniques to attempt to ferret out the truth.

Sad Day in Juvenile Court

One day I was sitting in juvenile criminal court. As the next case was called, the young woman who was the defendant was brought in by a transport team from the local juvenile detention facility, wearing handcuffs. She was charged with the latest in a series of drug related criminal probation violations. Unlike many of the children I see in that situation she was well groomed, attractive and intelligent. Her parents came in from the back and each took a position at the extreme opposite ends of the first row of the audience seating, glaring daggers at each other the whole time. The juvenile probation officer (in whom I had lots of confidence and who generally did not recommend incarceration in such cases) asked for a full revocation of her probation, which would result in her being in juvenile detention until age nineteen.

I was surprised by his recommendation and asked for an explanation. He explained that the corrections system had tried many different types of drug treatment and less restrictive options, including outpatient and in-patient residential care, but nothing had worked and that he was "out of options." He went on to tell me that the daughter had been caught between her parents in a bitter divorce and post-judgment motions case that had been going on for years. He explicitly said it was his opinion that the daughter's problems were the direct result of the way her parents had handled their divorce.

Probation was revoked, and I think the daughter separately hugged each parent before she was led away, although that may be faulty

recall. I have often wished that I had a video of that short but very sad hearing. I'd like to show it to parents who are failing to see the big picture earlier on in the process, and say to them "See—look at what can happen—this could be your child in a few years if you keep it up."

— J.D.K.

Court responses to high-conflict cases

Family courts have evolved a number of different ways to respond to the challenges of managing high-conflict cases. A brief description of each of these techniques follows.

Differential case tracking

Courts are increasingly attempting to identify "high-conflict" cases earlier in their life cycle, and to yank them off of this particular set of rails before the family is locked in intractable litigation. Once a high-conflict case is identified, any or all of the following tools will be applied to it.

Single judge management

Single judge management means that your court has either decided that it makes sense to have a single judge manage all stages of any particular family law case, or that this consistent attention is required not in all cases, but in certain identified high-conflict ones. To state the obvious, single judge management will be the norm in a small rural family court where one judge presides all the time. It can also be easy for courts to implement in large urban courts where family caseloads can be divided between a number of judges who do not move around from court to court.

While single judge management introduces a certain amount of administrative complexity, it is generally thought that the downside of this additional complexity is outweighed by the advantage of having one judge who knows the issues and players in a case handle all of the hearings. This should result in avoiding the problem of successive re-education of multiple judges as they pick up various parts of a case, fewer opportunities for a lawyer or party to "snow" a judge, and more consistency in rulings.

However, if your family court uses a circuit-court model, where there is a judicial district that is shared by a number of judges and those judges periodically move from one court to another, single judge management can be quite difficult to administer. It can also introduce

significant delay when the assigned judge is not geographically available.

Some courts have instituted a form of “super single judge management” known as “one family, one judge” models. In these models, one judge would handle any kind of family law action relating to a given family, including the initial divorce, any post-judgment motions, any protection actions, any child abuse or neglect cases, and any juvenile criminal proceedings. Again, in any system with rotating judge assignments this can become quite difficult to administer efficiently. It can also contribute to judicial burn-out. It can be quite daunting for any of us to contemplate managing multiple court events across many dockets for a dysfunctional family for eighteen years or so, until the children have all become adults.

Guardians ad litem and Parenting Coordinators

If a high-conflict case involves children, a common early response is for the judge to appoint a “guardian ad litem.” Later in the case, the judge may appoint a “parenting coordinator.” In either situation, the appointment of one of these court-related professionals may extend beyond the formal completion of the court case. [25]

Psychological and Vocational Evaluators

As previously noted in Chapter 4, psychologists or psychiatrists can also have an important role in cases affecting children. They can have a similar role in other issues. They may be hired by a party or a guardian ad litem. Or, the court may separately order “on its own motion” that a formal psychological evaluation of one or both of the parties be conducted.

In a similar way, one party may want the other party to be interviewed by a vocational evaluator. The function of a vocational evaluator is to assess a person’s education, skills and limitations, and to compare that person’s abilities and limitations to locally available jobs the person could hold, if any.

However they may be called upon to participate in a particular case. The use of one of these professionals is likely to be quite expensive. Their hourly rates will reflect their training and experience. At the low end, a psychological evaluation performed by a professional who sees it as a public service and has a sliding scale may be as little as \$750 per party. In our (relatively low cost) area of the country, basic evaluations, without any court testimony, are at least twice that. Full

family evaluations by specialty groups at urban medical centers who specialize in this work may be as much as \$10,000 to \$20,000 per family.

Referees and special masters

Most states' rules of procedure for civil cases are modeled on the Federal Rules of Civil Procedure (F.R.Civ.P.) which were first adopted by the federal courts in the late 1930's. F.R.Civ.P. 53 contains a procedure which allows a judge to appoint a quasi-judicial official, often called a referee or a special master. States that model their rules on the federal model have similar provisions usually contained in their state Rule of Civil Procedure 53. There is a longer discussion of referees and special masters in Chapter 7.

Judges use Rule 53 authority in two very different ways. First, they can appoint a referee, who is given the authority to try the factual dispute between the parties as if he or she were a judge, and to make a report to the court, which the court will adopt as its final judgment unless objected to. Referees are generally only appointed in family law cases if both parties agree to this procedure. They function in the same manner as arbitrators, except that they are formally appointed by the court. In fact, it is usually quite hard to get a referee's report overturned if a party does not agree with the referee's conclusions. While the parties have to pay the referee for her or his time, and give up some of their practical ability to appeal, use of a referee is often very attractive for a number of reasons. First, cases can often be heard sooner. Second, the referee can be much more flexible on scheduling issues, can accommodate the parties' and lawyers' other commitments, and may be willing to schedule the reference hearing at a time that the court cannot, such as an evening or a weekend. Third, rules of procedure and evidence are often more relaxed, and the surroundings more pleasant than in a large public courthouse. Fourth, the parties operate in a significantly more private arena than in most family courts, where the court files are presumptively public records. Finally, referees often specialize only in family law, or just a few other types of cases. As a result, their attention is not diverted by the many types of other cases judges have to attend to. They also have far smaller caseloads. All of this will improve the chances of a prompt decision.

Rule 53 can also be used to appoint a special master. As previously mentioned, special masters can perform certain functions that might otherwise be performed by a parenting coordinator. They can also be used by a judge to manage complicated issues such as managing the division of a large number of personal items, or the sale of a residence

or business when the parties are unable to manage such tasks as selecting a realtor, or setting a listing price.

Court appointed experts

Expert witnesses are persons who testify on specialized issues beyond the competence of an ordinary “lay witness.” Experts are not only permitted to testify about facts, but also can offer “expert opinions” derived from the application of their specialized knowledge to those facts. Experts are commonly used for topics such as medical and mental health diagnosis, vocational evaluations and valuations of businesses, antiques, or other specialized pieces of property.

The “traditional” model for the use of expert testimony is for each side to hire their own expert, who presents an opinion that (at least, hopefully) supports that party’s theory of the case, and for the judge to decide between the competing experts’ opinions. Each party will often conduct a deposition of the other’s expert before trial, in order that their expert will be forewarned of the other’s opinion. Needless to say, this is a very expensive way to do business.

Courts usually have the authority to hire their own expert, and to make the parties share the cost of hiring the expert. (Most states model their Rules of Evidence on the federal court rules. The federal rule authorizing this is F.R.Evid. 706 and corresponding state rules of evidence will usually be similarly numbered.) In some cases the court may convince the parties to simply agree to hire one joint expert. In other cases, the court may feel that it does not have the evidence it needs to properly decide a case, and hires its own expert, with or without the consent of the parties, to fill in the gaps in the record.

Either one of these approaches can save the parties money and save the court unnecessary trial time. However, this approach can also backfire. Even if the parties agree on, or the court orders, a joint expert if one party is unhappy with that expert’s conclusion, that party may then go out and hire a “rebuttal expert.”

Children’s Issues in High-conflict Cases

High conflict cases that revolve around children and related issues can be particularly tragic. While no one ever starts out intending this result, if the parents become wedded to conflict about their children, it will very often have the effect of stealing the children’s childhood. The children will get sucked in, have to grow up too fast, and may even become “parentified,” that is, the children begin to fill adult

roles that should never be put on their shoulders.

Many states, including ours, either explicitly require or strongly encourage parents in contested family cases to attend co-parenting education classes. These classes are sometimes provided directly by the court, and often are provided by a local non-profit or social service agency. There is often an initial required class of a half- or full day, which may be followed by optional classes or peer group sessions.

Similarly, many social service agencies offer “parenting education classes” which are valuable for new parents. These classes do not focus on the particular challenges involved in divorce cases, but rather on basic parenting skills useful for any new parent. Each of these two models has been around for some time.

There is a third, and relatively new, type of more intense and individually focused education for parents involved in high-conflict cases. These courses are 6 to 12 session programs, in which the parents work quite intensively with lawyers and mental health professionals to improve their co-parenting skills. Given the nature of these particular cases, the parties will usually not attend unless compelled to do so by the court. (If a domestic violence problem has been identified, courts will usually not require the parents to engage with each other in this type of program.) Despite the initially coercive nature of the court’s order, we have each seen cases in which this kind of program literally has worked miracles, and has created an atmosphere in which each party readily agrees to change their behavior for the benefit of their child.

Creating Miracles

In our home state of Maine, both of us have been involved in a parent education program designed for parents who really need intensive help. The program, run by the Kids First Center of Portland, a highly-regarded resource for divorced and separating parents and their children, has 10 weekly sessions, the first and last of which are in the courtroom. So we judges see the parents as they come into the program and when they graduate.

One set of parents I remember best were very young—in their teens when their daughter was born. They had broken up before she was born, and by the time she was two years old, things were so bad between them that they were ordered to bring their daughter to the police station lobby when it was time for her to go from one parent to the other. When they started the program, she had never seen her mother and father together, except during those tense exchanges in that police station.

Both did very well in the program, which showed they both wanted things to be better between them but didn't know how to make that happen on their own. At the program's graduation, I asked them whether their involvement with the parenting sessions had made a difference to them and their daughter. They spoke of how they had taken her to an amusement park together and of how the three of them had walked hand-in-hand around the park, each parent holding one of their daughter's hands as she walked between them. I said to them in the courtroom, "What a great gift you have given your daughter—a gift no one else in the world could have given." To me, it felt like a miracle.

— A.M.H.

Of course, miracles cannot be compelled by courts or these programs. Many other people go through the whole program, only to find the conflict as intractable as when they began. Nevertheless, this is a valuable new tool, and hopefully additional research will begin to identify which specific elements work well and which do not. Over time, that research can help to improve the model, and hopefully result in an increased success rate.

State child abuse and neglect agencies

Every locality in this country has a public agency to intervene, prevent, or stop incidents of child abuse and neglect. These agencies can be administered on a local, county or state basis. Their areas of responsibility sometimes overlap into "private party" family cases. Or, they can independently initiate separate court actions, either to take children into the state's custody, or to leave them with one or both parents, but under supervision by the agency.

These agencies are known by a wide variety of names, but we will refer to them collectively as DSS ("Department of Social Services") agencies.

Abuse or Neglect Referrals

The core functions of DSS agencies are to receive reports of child abuse and neglect, to evaluate those reports, and if the agency determines that there is an immediate risk of danger to the child, to take the child into state custody, and seek prompt court review. Virtually all DSS agencies receive federal funding under the federal Adoption and Safe Families Act (ASFA), and are therefore subject to a number of federal requirements. These agencies have a really unenviable job; in virtually every case DSS workers need to make

quick assessments about the level of risk, and decide whether to remove a child. If a child is mistakenly removed there can be long term negative consequences to the family, or child, or both. On the other hand, if a child should have been removed, and was not, the child is exposed to trauma or even death. If a child is wrongfully removed based on false allegations the agency is subject to one type of public and private criticism. Alternatively, if the agency makes a bad evaluation and the child is left in a dangerous home, and is later injured or killed, the agency will face scathing headlines and withering public and political criticism.

If a DSS agency assesses that there is an immediate risk of serious harm, the agency will seek some type of emergency order asking a judge to give the agency temporary legal and physical custody. Under ASFA the state must promptly provide the parents with the right to have a further review, known in most jurisdictions as a “preliminary hearing.” If a judge decides there is sufficient evidence for the case to proceed the court must later provide a full “jeopardy hearing.” ASFA requires that the full hearing must generally be held within 120 days of the date the child was first taken into state custody.

In general the DSS agency must provide services and attempt to reunify the child with his or her parents. However, if the parents are unable or unwilling to take the necessary steps to remedy the dangerous conditions within no more than 15 months, AFSA requires the state to move to terminate the parent rights, and to place the child for adoption in a safe home.

Services-only referrals

A DSS agency can conclude that a referral is not serious enough for the agency to take custody of the child, but that valid concerns about some less critical element of the home environment have been identified. In such cases, the DSS agency may refer the parents to a social services agency that it contracts with, and provide supportive services or remedial training to the parents. This may or may not be coupled with a formal “safety plan” agreement in which the parents agree to take certain steps to protect the child’s safety. This safety plan can require simple steps, such as putting up child safety guards around a heater or woodstove, or drastic ones, such as requiring an abusive new partner to leave the home. Refusal to accept services, or failure to follow through on an agreed safety plan, could result in the agency re-evaluating the risk, and deciding to seek a custody order.

Home Evaluations

The DSS agency may also be required to conduct home studies if a court requires one as part of an ongoing custody or other non-abuse family law case. These studies can serve some of the investigative and recommendation functions provided by a guardian ad litem, but they are usually far less comprehensive and provide a “snapshot” of conditions in a home, rather than a more nuanced global view developed over time.

Interstate Compact Studies

Finally, DSS agencies have to co-operate with each other to conduct multi-state home studies when one parent lives in one state, and another parent lives elsewhere. Interstate compact studies may also be required if a DSS agency wants to place a child in a foster home, or an adoptive one, in another state.

Special types of high-conflict cases

We could literally write a separate book about each of the following special types of high-conflict cases, and you can probably find one or more good books about each of them. These summaries are designed to give you only a very brief introduction to the issues likely to be raised.

Interstate relocation of children

In “ordinary” high-conflict cases, the decision that the judge often has to make is which of two very flawed parents will be “least bad” in providing a consistent, safe and loving home for their child. Unfortunately, interstate relocation cases often require the court to make an even harder decision. If two fine parents have been cooperating at least adequately, and one of them has a good reason to relocate a great distance from the other, the court will have to decide which of these good parents will have their day to day contact with their child significantly reduced.

Jurisdiction of these cases is governed by the Uniform Child Custody Jurisdiction and Enforcement Act(UCCJEA). Either this law or its predecessor, the UCCJA, has been adopted by every state. The law establishes the “home state” concept for deciding which state will hear the case. Generally this is the state in which the child has lived for at least six months. Once the home state establishes the right to hear the case, it keeps it, unless both parties and the child have moved from the home state, or the courts in the home state decide to give it up.

In most interstate relocation cases, it will be necessary to appoint a

guardian ad litem, and to have the GAL evaluate each of the potential homes for the child. In some cases, it may be possible for the GAL appointed in the home state to sub-contract with a GAL in the other state, and save travel costs.

The court will make every effort to soften the negative effects on the parent who is not allocated primary residence, usually by allocating virtually all school vacation time to that parent, and by providing other additional mechanisms for contact. However, no one can seriously argue that any substitute for regular in-person contact is as good for either the child or the parent.

Having said that, it is now possible for most people to construct a functional video-conference mechanism using the internet, readily available hardware, and software services such as Skype, AOL Instant Messenger or .mac. We have used this option in several cases where families were split between each coast or other long distances where frequent in-person contact was impossible or functionally impossible due to cost.

Allegations of child abuse or neglect

Unfortunately, it is not uncommon for one parent to make allegations that the other parent is abusing or neglecting the child during or after a highly-conflicted family case. The complaints may be made in the case itself, in a related protection from abuse action, or by a complaint to a local, county or state DSS agency. Sometimes the allegations are made against the other parent, other times against the other parent's new partner or step-parent, and sometimes against other family members such as a grandparent or step-brother or step-sister.

Allegations of physical abuse can often be substantiated or ruled out. Allegations of neglect or of emotional abuse can be very hard to substantiate and to evaluate. If the two parents were themselves raised in families with very different parenting styles, behavior that one parent may think of as emotional abuse may be thought of as perfectly normal and adequate parenting by the other parent.

It is likely that the DSS agency will give the most credence to reports of abuse or neglect made by a neutral professional such as a teacher or a doctor. (They are usually designated by law as "mandated reporters;" that is, they are required to report credible evidence of abuse or neglect to the appropriate DSS agency.) The agency is likely to give less credence to allegations made by one parent against the other, especially if there is a contested divorce pending. If a report has

previously been made by a complaining parent, and that report has not been substantiated, the agency will likely give very little weight to later complaints by that parent, unless there is physical or other reliable evidence to support the new complaint.

Allegations of substance abuse

Most of the cases we see, in virtually all kinds of district court dockets, result in one way or another from drug or alcohol abuse. Some forms of this abuse are relatively easy to identify, such as use of seriously addictive and illegal drugs (methamphetamines, heroin or cocaine, chronic alcoholism) or dealing drugs of any kind. This abuse will very likely result in the loss of primary residence of a child.

Other types of drug abuse, such as abuse of legal prescription medications prescribed to a person, or alcohol or marijuana abuse that has not produced (or at least not yet produced) disabling symptoms, can be easy to hide from outside observers, and very subtle. The most often used dangerous drug in our society is alcohol and it is also the most commonly abused drug. However, there are many people who are able to use alcohol in moderation, without danger to themselves or others. Two parents in the middle of a high-conflict case are almost certain to evaluate the other parent's use of drugs or alcohol quite differently, and try to use the issue to each of their own tactical advantage.

These cases can be very hard for judges to assess accurately, and a guardian ad litem is often appointed to help sort out what is true and what is not. A GAL can use a number of techniques. Some example techniques would be random visits to a parent's home, review of past medical records, police records, urine tests, or hair follicle analysis to try to assess objectively whether a parent does or does not have a drug or serious alcohol problem.

Allegations of mental health issues

Many people who have treatable mental illnesses are perfectly good parents, and should not be disqualified from being a child's primary residential parent. However, other people who are not compliant with their medications and treatment, or who suffer from a serious mental illness that is not effectively treatable, may functionally be disqualified from being designated as the custodial parent of a child. Even more than the other conditions discussed here, mental health function and dysfunction are on a continuum. The precise evaluation of where a particular person sits on that continuum can be

frustratingly difficult for a judge to determine. It is both true that no one is entirely rational all of the time, and only a few people are so irrational so much of the time that they cannot function as good parents. In addition, it is probably true that every party in a conflicted divorce will have some diminished level of globally assessed functioning that stems from the stress of the case itself.

Psychological evaluations can be a good tool, and will generally include a comprehensive assessment of the family history. The judge or GAL also has to assess whether one party was satisfied with the other party's parental performance before the divorce began, but now asserts that the other parent (whose mental state has not materially worsened) is not a fit parent. The complaining parent better have some reliable evidence to show that the reality of the situation has actually changed for the worse, or the judge or GAL may well conclude that the complaining parent is trying to use the other party's mental illness as a tactic to gain an unfair advantage.

Allegations of domestic violence

We now know that exposure to domestic violence in a home will have serious effects on a child, even if the child has not been physically injured, but “only” exposed to violence in the home. Research has clearly shown that exposure to domestic violence can literally change the hard-wiring of a developing brain. Early exposure to this kind of environment can have numerous life-time negative effects, including post-traumatic stress disorder, difficulty in forming adult intimate relationships, and unfortunately, a higher propensity for the child to carry on the abuse in the next generation.

Most states include provisions in their laws that create presumptions that the court will not allocate primary residence to a person who has been adjudicated as a domestic abuser. Other provisions presume that contact rights should only be allocated if adequate provisions can be made to protect both the victim of the abuse and the child from further harm. This usually means that if contact is to occur, the court will require that arrangements be made through a third party, and that the visits themselves be supervised. While judges are generally reluctant to completely cut off a parent's contact with a child, serious domestic violence is a reason they may be willing to consider such an extreme step.

Another Perry Mason Moment

In one case which I heard a few years back, the Dad was seeking to get unsupervised visitation after a year or so of supervised contact.

(Dad had previously been convicted of a serious incident of domestic violence.) Dad testified pretty convincingly about his two years of sobriety and the good lessons he was learning in his batterer's intervention class. His testimony was corroborated by similar testimonials from his new girlfriend about his sterling character. Mom was not a terribly convincing witness about her suspicions that it was all an act, and I was well on my way to making what would have been a serious mistake.

Mom's lawyer was very smart, and called a surprise rebuttal witness, who was the bartender at the local pub that Dad frequented. While the bartender was very unhappy to have been subpoenaed, she testified quite convincingly that Dad was a regular, as was his new girlfriend, and she was sure that he had not been ordering non-alcoholic beers.

Not only did Dad not get the unsupervised visitation he was seeking, I made a referral to the District Attorney's office for a prosecution for perjury.

— J.D.K.

Parental kidnapping

In the United States there are approximately 300,000 reports of kidnapping by a parent or other close relative each year. This undoubtedly inflates the scope of the real problem somewhat, as any complaint is counted, whether legitimate or not. However, even if one discounts this number by 50%, that would mean that there approximately 400 parental kidnappings per day, each and every day of the year.

There are a number of state and federal laws which are designed to cope with this problem, and which impose either civil or criminal penalties for a parent wrongfully removing or retaining a minor child. Under the UCCJEA, the left behind parent can go to any court in the state where the other parent has the child, and file a motion for immediate return. The court must schedule a hearing to be held on the "next judicial day."

In addition to laws governing parental kidnappings that occur within this country, the United States is a signatory to the Hague Convention on International Child Abduction. About 70 other countries are signatories to the Hague Convention, including most democracies. Under the Hague convention, other signatory nations are required to recognize the home country's (the place of the child's habitual residence) presumptive right to make child custody determinations, and to return the child so that a hearing can be held there. However,

there are some exceptions to this rule.

If your child has been abducted by his or her other parent, time is of the essence. These cases are one in which you should be represented by an attorney, if at all possible. If you need help in finding an attorney, or if you have more detailed questions you want answered we suggest you contact the National Center for Missing and Exploited Children (1-800-843-5678 or <http://www.missingkids.com>).

The Baseball Team and the Funeral

Parents can often act in somewhat bizarre ways when they are enmeshed in a high-conflict family law case. Some of their more extreme behaviors can result in allegations of parental kidnapping where the alleged kidnapping is not criminal conduct, but just a heightened extension of the parents' conflict.

In one of the more memorable cases I have heard, two parents were struggling over the primary residence of their teen-age son. The parents were very different personality types, and had very different views about what was in their son's best interests, and what were appropriate parenting strategies.

In the midst of the family's struggle, the parties could not agree as to whether their son should, in company with other members of his junior high baseball team, attend the funeral of his sister's best friend. I found the following facts: Without consulting with the dad, the mom forbade the son to go to the funeral. The dad then reacted in kind, colluded with their son, and the next morning picked him up from his grandparents' house (without any notice or explanation to the grandparents). Running across the street, the son leapt into the dad's van and the dad took him to the funeral.

The mom then responded by calling the police and reported that the son had been kidnapped by the dad, but that they both could likely be found at the funeral. The police went to the funeral service, initiated an interview with both father and son at the rear of the church and then, at the close of the service (in view of the other mourners) transported the son back to mom via the locked rear seat of a cruiser. The police wisely elected not to charge the father with parental kidnapping.

This was an extreme example of two parents' failure to cooperate and their resulting gamesmanship, which lead to a result that was virtually certain to cause humiliation and embarrassment to their child. One can hardly imagine a set of facts that would be more embarrassing to an adolescent boy. One of the morals of the story is that not every accusation of parental kidnapping reflects reality.

— J.D.K.

Allegations of parental alienation

Parental alienation occurs when one parent, almost always the parent with primary residence, engages in a deliberate course of conduct designed to alienate the child from the other parent.

A lively academic debate about whether a formal syndrome, known as “Parental Alienation Syndrome” does or does not exist, has gone on for years. While the prevailing sentiment in the scientific community is that a diagnosable clinical syndrome does not exist, most family court judges and lawyers know that alienation of a child in one parent’s custody from the other parent does in fact occur.

Unfortunately, it can be very hard for a trial judge to distinguish between those cases in which a child’s alienation from his or her non-residential parent is the result of deliberate alienation encouraged by the other parent, or the result of the child’s own spontaneously generated dislike for the non-residential parent. This dislike could be due to that parent’s own past bad behavior, or by the usual emotional roller coaster of adolescence, or by some combination of both the child’s unprompted wishes and the parent’s alienation.

Sometimes, by the time one of these cases comes to court for a final hearing, the alienated child is so entrenched with the residential parent that it will do more harm than good to try to force the child into contact with the alienated parent. These cases can be heartbreaking, as the court’s focus has to be the child’s best interests, rather than what is fair or just as between the parties.

These cases are full of conflict and bitterness, often quite protracted, and expensive. Early and vigorous representation by competent counsel is strongly recommended, but will not guarantee success. One can only hope that in those cases where the court is functionally unable to remedy parental alienation, the parent who has been successful in alienating a child from her or his other parent will ultimately receive the divine justice that is so richly deserved.

New partner conflicts

Parents are often able to get through an initial divorce cooperatively, or at least without much overt conflict, only to find that trouble arises when either they or their partner becomes involved with a new intimate partner. The boyfriend or girlfriend may be jealous of the old partner’s continued involvement in the parent’s life, or may be resentful of the amount that has to be paid to the former partner in

child or spousal support, or both.

The most common issue that we see involving new partners is that the parent who has a new partner is often far too aggressive in introducing the new partner to his or her children. The consensus amongst the experts we see is that it is not a good idea to even begin to introduce a new partner for at least six months. The parent, who is usually in the exhilaration stage of the relationship with the new partner, may also attempt to force the creation of a relationship between the children and the new partner, rather than allow it to grow organically. This is usually a self-defeating strategy.

We strongly recommend not permitting a new partner to become involved in one's relationship with a former partner. If that can't be avoided, let us suggest a more modest and certainly achievable goal—it is never a good idea to bring one's new partner to any kind of a family court hearing involving one's former partner. (The only exception we can think of is if the new partner is the only corroborating witness to criminal or other very bad behavior by the old partner.)

If you find yourself feeling caught between the interests of a new partner and an former one, we suggest that you get thyself to a competent counselor who has an expertise in family systems, and work with that person to try to develop strategies to eliminate or minimize friction points. If you don't, your life is likely to become very unpleasant, with problems in court perhaps being the least of your troubles.

Mace at the Courthouse Door

In another example of outrageous behavior, the parties were in court before another judge for a final divorce hearing. The husband unwisely brought his new girlfriend to court to observe the proceedings. The judge finished hearing the case and indicated he would issue a written decision. As the parties left the courtroom they were directed to different stairways by court security.

Unfortunately, they managed to come back together at the only exit from the secured courthouse. As they went out from the security station "words were had." The situation escalated and the husband felt compelled to mace his almost-ex-wife in order to protect the new girlfriend's honor.

The result was that the almost-ex-wife lay face down on the sidewalk screaming, the girlfriend was backed up against the wall of the courthouse, the husband was standing in front of her with his arms spread out (to further "protect" the girlfriend), as court security and

police officers were running to the scene from all directions. I can't think I have ever seen any good come from bringing one's girlfriend, boyfriend or new spouse to a court hearing, mediation, or other divorce-related event where the former partner was present.
— J.D.K.

Intergenerational conflicts

Perhaps the saddest cases we see are those in which parents are pitted against their own children. These can arise in a number of circumstances—most commonly when a grandparent's contact with a grandchild has been cut off by the child's parent or parents. The grandparent files a court case seeking an order for contact under a state's "grandparent's rights" law.

Or, a grandparent may align him or herself with the other parent and against their own child, as a divorce or other family law case plays out. Sometimes this occurs because the grandparent realizes that the other parent will in fact provide a more stable home than his or her own child can. Other times, the reason is less wholesome, and some kind of troubled family psychodrama is playing itself out in the courtroom. Similarly, grandparents sometimes seek to be appointed as legal guardians of a grandchild over objections from one or both parents, sometimes for the best of reasons, other times not.

Another form of intergenerational conflict can arise in a contested emancipation petition, in which a sixteen or seventeen year-old teenager seeks to be declared an adult by law, free from parental control, and the parent objects. Once again, the parent's objection can be out of legitimate concern for the child's well being, or for more selfish reasons.

Whatever the context, and however good or bad the motivations of the parent and the child, these various intergenerational conflicts are amongst the most unpleasant of the cases we see in our courts. Perhaps even more than spouses, children and parents have the unerring ability to ferret out the other's weak spots, and when under pressure, have few scruples about going after those weak links, often in extremely hurtful ways.

We can give you little practical advice about these cases. Judges generally hate them. Whether or not you have a lawyer may not make a lot of difference. If at all possible, try to get your family members to agree to sit together with a trained counselor and see if there is some way your family issues can be resolved by agreement and out of court.

In our experience, no one, whether they are the ultimate “winner” or “loser,” gets any long term gain or emotional satisfaction from litigating these cases.

Allegations of sexual abuse

We have consciously left this topic for last, as it is the “A-Bomb” of family litigation. Once the sexual abuse card has been played it can never be taken back. It raises the stakes immeasurably for all kinds of reasons, not the least of which is that it may ultimately expose the accused person to felony criminal charges, and perhaps lengthy incarceration.

The mere act of making a sexual abuse allegation will irretrievably change the family. It really does not matter if the allegation is made about the other parent, the other parent’s new partner, or some other member of the household—any sexual abuse allegation against any household member will wreak havoc.

In the short run, police, judges and social service departments are likely to act as though they assume the allegation of sex abuse is true, on the theory that the first priority is that the child must be protected from the possibility of continuing sexual abuse. As a result, children are removed from their homes without any notice. A parent may have to make an immediate choice between throwing a new boyfriend or girlfriend out of the house, or even out of their lives, lest they risk removal of their child.

However extreme the systemic response may be in the short term, when taking the longer view, judges and other decision makers tend to be quite skeptical about sex abuse allegations against the other party or a person living with them when those allegations first arise in the context of a contested divorce.

Often, when there is an allegation of sex abuse but there are no physical manifestations, the child is sent to a professional clinician for an examination. Unfortunately, the final response of a professional evaluator is usually: “Our evaluation uncovered no persuasive evidence of sex abuse, but the absence of evidence is not evidence of no abuse having occurred.” This kind of conclusion is unsatisfactory from everyone’s point of view. The evaluator is frustrated that he or she could not offer a more definitive opinion. The accused parent is not substantiated for sex abuse, but also does not receive a clean bill of health, and the parent’s relationship with the child may be adversely affected in obvious or subtle ways for years. The accusing

parent will never be certain her or his child will be safe with the other parent, but will likely have to allow contact to occur despite his or her reservations. Needless to say, we advise that you think carefully before making such an allegation.

Consequences of Deceit

As we have mentioned in other sections, it is our experience that the truth usually does emerge. Truth is a stubborn thing, and it turns out that it is actually very hard to sustain an untruth over time. Cracks in the facade begin to appear; they need to be papered over with new fabrications, and ultimately the whole house of lies becomes too complex to sustain, and collapses when one of the supports begins to come unglued.

Great unhappiness may come to the parent who finds himself or herself exposed in court as the architect of such an edifice. I heard a case where I came to believe that a parent relocated her children to another state after giving the other parent little advance notice, and then began to construct a false rationale for having done so. The GAL did not believe this parent and neither did I. Had she come into court and admitted an error in judgment, and made a good faith attempt to mitigate the damage by setting up a plan to maximize the other parent's time with the children, she likely would have retained her primary residence. Instead, custody was transferred to the other parent.

— J.D.K.

The worst case scenario for the accusing parent is for the judge to conclude that the parent has fabricated the accusation. Recognizing the gravity of this issue, and without other strong evidence, a judge is likely to react quite strongly, conclude that the accusing parent will not be able to cooperate with the other parent and the judge's decision may conclude that a change in primary residence is called for.

This does not in any way mean that an honest parent should ignore allegations or other evidence of sexual abuse of any kind. These allegations need to be taken seriously, and they should be pursued if there is a legitimate basis for them. However, this is not a game of tiddlywinks. A careful evaluation of the evidence should occur before a sex abuse allegation is casually thrown about. Preferably an evaluation from a professionally qualified and neutral source should be obtained first. But if that source can't determine that abuse occurred, you should proceed cautiously and ask yourself if it is really likely that a judge will see persuasive evidence of abuse if a professional evaluator has looked at the case, and has not.

High conflict cases really are the nightmare aspect of family law. While courts are evolving techniques to try and manage them better, they are usually long, expensive and bitter. Often, there is no real winner—instead the parties are partners in a dance of mutually assured destruction. As we have noted here and elsewhere, if children are involved, they are almost always the real losers, and often wind up with shattered childhoods.

However much you may be tempted to go down this road, whether for good reasons, simple emotion, or desires for retribution or revenge, the simple truth is that you do have the ability to make your former partner's life miserable. However, the results will not be one-sided, as there is usually an equal and opposite reaction in litigation (just as there is in classical physics). Consequently, your life will almost certainly become equally miserable. You can go a long way toward saving everyone from this misery if you resist the inevitable temptations to take the case down into the gutter.

Chapter 10

While Your Case is Pending in Court

“Preparation is the be-all of good trial work. Everything else—felicity of expression, improvisational brilliance—is a satellite around the sun.

Thorough preparation is that sun.”

— Louis Nizer

“Proper preparation prevents poor performance.”

— Coaches everywhere

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nce a divorce case or other family case is filed with the court, it goes through different phases on its way to trial. This chapter is about the phases in a divorce case or other family court case after the case has begun but before it goes to trial. It covers what you should be doing while your case is pending. The next chapter—Chapter 11—covers the trial process.

Both chapters are primarily written for those who must represent themselves in court. However, we hope they will be useful also for people who have (or plan to have) lawyers in family court cases. For example, whether or not you have a lawyer, you might still consider our suggestions about saving everything you might need to present in court and documenting everything that might be contested in court, and you likely will enhance the strength of your case. Even if you have a lawyer, our suggestions about getting organized may enable you to save the cost of paying your lawyer or your lawyer’s staff to perform those tasks for you.

Both this chapter and Chapter 11 build on what we have covered in Chapter 8 (*How Family Courts Work*). If you haven’t read Chapter 8, we suggest doing so now, to enhance your understanding of what we about to cover. While you are at it, also read Chapter 9 (*The Dark Side*), if you haven’t already.

Warning – Proceed at Your Own Risk!

In presenting information on how to represent yourself in court, we feel compelled to warn anyone who plans to do so about the risks and

pitfalls involved in going it alone, without a lawyer.

- The saying that a lawyer who represents herself or himself in court has a fool for a client rests on a basic truth. Lawyers need to be more than just advocates in court; they should be counselors as well, helping their clients make good decisions. Lawyers who try to represent themselves in court may have all the necessary training and skills, but they can never be fully objective about their own situations. The same is just as true, if not more true, of someone who doesn't have legal experience. If you must represent yourself in court, find someone to be your sounding board—someone whom you trust completely, someone who has no agenda, someone who will understand, and someone who will speak the truth no matter how painful it might be for you to hear.

- The rules of the game are the same, whether or not you have a lawyer. In family court, the ground rules in and outside the courtroom are usually the same for parties who have lawyers and those who don't. A family court may have brochures or a website to help pro se parties understand and navigate the court rules and process. However, self-represented parties—often called pro se parties—are still expected to know the rules and meet the deadlines, just as parties who have lawyers must do. In practice, some judges give a little more latitude to pro se parties, especially on minor issues when a little latitude will not “prejudice” (meaning be harmful or unfair to) the other party, to help assure that justice is done. In some circumstances, even if the judge were inclined to overlook a missed deadline or other rule, the judge has no choice but to enforce the deadline or rule. Other judges enforce the rules strictly all the time, whether or not the parties have lawyers.

- The rules of the game are not easy. There is a reason why people hire lawyers—having someone on your side who knows the law and the rules of court can be very helpful. If you don't know the law or the rules, you may not even realize what rights you have; you may give away significant rights or opportunities without knowing they exist, and you may wind up losing a case you could have won with a lawyer. This book is intended to help make the playing field a little more level for a self-represented party than it might be otherwise, but no book can substitute for having a lawyer, because no book can give situation-specific advice, as a lawyer can and should do for a client. For all of these reasons, if your case is headed to trial, we recommend as strongly as we can that you do your best to find a lawyer to help you. Read our chapters on lawyers and ask at your family court and local legal aid organizations, for ideas on how to find a lawyer. Beg or borrow, if you must, to get the money to hire a lawyer. Save money by using a lawyer for some but not all tasks in your family court case.

But don't represent yourself at a contested hearing or trial unless you have no choice.

At the same time, we recognize that some people will represent themselves, whether by choice or by necessity. Some say that, because representing yourself in court is so perilous, people should not be educated on how to do that. This viewpoint ignores the reality in family courts across America. Most self-represented parties would have lawyers if they could. Those of us who work in the courts have an obligation to help people in that situation as best we can. Part of providing that help is to make sure that people do not underestimate the challenges and drawbacks of representing yourself in court. People should not represent themselves in contested cases except as a last resort. It is in that spirit that we offer this chapter—as a resource to people who must represent themselves in family court.

When to Start Preparing for the Possibility of a Trial? (Now Would Be Good)

A saying among trial lawyers is that a lawyer should begin preparation for trial of a court case as soon as the lawyer takes on the case. We do not suggest that you need to decide at the beginning of your family case who your witnesses will be or what they will say. Most cases are resolved without a trial, and, besides, if you are involved in a family court case, you probably have more pressing tasks before you.

It takes months and sometimes years for a family case to work its way through the court process from filing. During that time, there are steps you should take in case your case goes to trial, and also in case it doesn't—meaning that it is settled by agreement.

Here they are, in summary. The rest of this chapter gives detailed suggestions on how to carry out most of these steps while your case is pending in court.

- *Understand the court process:* In addition to reading our Chapter 8 (*How Family Courts Work*) study your court system's website, get your court's handouts on divorce and family court.
- *Show up and participate:* Your court likely will schedule various court events while your case is pending. Always prepare ahead of time for these and *show up*. Preparing ahead of time means having a clear understanding of what the court event is about and being ready for it. Is the event an *evidentiary hearing*—a hearing during which the court takes evidence in the form of testimony and exhibits—and if so, what

issues will be hearing be addressing? If it is a conference of some kind rather than a hearing, what will be discussed and what information will the judge be asking the parties to provide? The court clerk may have answers to these questions. Your family court's materials for self-represented parties may also be helpful.

- *Make and keep a record of significant events and conversations:* Confirm agreements in writing. Keep a calendar of events involving you, the other party and your children. Later in this chapter we discuss this topic in depth.

- *Decide what you want:* The court will need to know what you are looking for in terms of property, finances, and child-related areas. Read our Chapters 3 (*Finances, Property and Support*) and 4 (*If You Have Children Together*) to find out how courts make decisions regarding property, finances and children, and then set realistic goals for yourself.

- *Try to reach agreement with the other party:* Except in cases of domestic violence or severe mental illness, the family court encourages the parties to resolve the case by agreement. Many courts require mediation along the way, but you don't need to wait for the court process to open discussions aimed at settlement. Read our Chapter 7 for suggestions on how to resolve a family case by agreement.

- *Identify contested issues:* At various points in your case, the court will ask you and the other party what aspects of the case are agreed to and which aspects are not. The contested issues will define the scope of the trial at the end of the case, and will influence the scope of *discovery* before trial.

- *Focus on what evidence you and the other party will need present at trial:* Don't wait until the brink of trial to start focusing on your evidence. Your focus should be on what evidence you can develop yourself and what evidence may be in the hands of the other party. The process of *discovery* is available in any family court case, and if the other party has information or documents that you need to present your case, the *discovery* process enables you to get what you need from the other party. The *discovery* process also enables you to get a preview of what information and documents the other party intends to present at trial. We discuss the discovery process in Chapter 8 (*How Family Courts Work*), and also toward the end of this chapter.

The rest of this chapter covers most of these areas in more detail.

Making a Record of What Happens and Keeping What You Might Need

You won't necessarily know what evidence you will need until the later stages of the court process. It is then that you and the other party will know for sure what areas remain contested and will therefore need to be presented at a trial. To protect yourself, you should make a record of significant developments or incidents, and you should keep documents that might become evidence at a trial. Here are our specific suggestions:

- *Save things you may need to present in court*

Depending on the issues involved in the case, a family court trial may involve any or all of the following documentary evidence: tax returns; school notices; grade reports for children; day care bills or notes to parents; real estate closing documents; doctor's bills, doctor's notes and other medical records; canceled checks, deposit slips, bank statements and other bank account records; e-mail messages or letters between the parties to the court case; photographs; tape recordings of conversations between parents; videotapes of children being picked up or dropped off for visitation with parents; travel itineraries; notices from state child welfare agencies, and almost anything else you can imagine.

Almost all of this evidence is submitted to help prove or disprove what one of the parties in the case is telling the court. Almost all judges will put more stock in what a party is saying if the party can back it up with other evidence. That other evidence can include the testimony of friends and family, but keep in mind that judges are used to hearing from friends and family who support the "party line," by adopting the viewpoint of the party who has asked them to testify. Often the most powerful evidence a party can present is a document that proves a contested point—a letter from the other party admitting some important fact that the other party is now contesting in court, for example, or a cancelled check proving that a disputed payment was made.

Because you may not know until shortly before the trial of your case what will be in dispute, or even that your case will need a trial, save everything you think you might need.

- *Confirm in writing or otherwise what is important enough to be confirmed between you and the other party.*

To family court judges and lawyers, a “he said-she said case” is one in which neither party has any real evidence to support their positions beyond their own testimony. Often parties enter into oral agreements—meaning agreement spoken in words and not written down. Often, because there is nothing in writing, the parties disagree on what the agreement was. The best way to avoid the “he said-she said” situation is for there to be an exchange of letters or e-mail messages between the parties.

For example, if you and your spouse have agreed that you will move out and let your spouse keep the home if your spouse takes over responsibility for the mortgage, taxes, insurance, maintenance and all other house-related expenses, get the agreement in writing and signed by you and your spouse. Make sure what is written down and signed covers all of the essential details.

If that is not practical, at least send your spouse an e-mail message or a letter confirming your understanding of the agreement. If you do write a letter, think about how you will prove the other party got the letter if the other party denies receiving it. If you send e-mail messages, save and later print them actually as they were sent and received. Any editing, even if to make e-mail messages clearer to read, may subject you to charges of altering or even forging evidence.

Another way of “confirming” what happened or what was said is to record conversations or other interactions (such as children being exchanged between parents) by audiotape or even videotape. However, this is not something we favor, unless everyone agrees to the recording. Generally, it is legal to record a conversation when all of the people being recorded know of it, even if they don’t consent to the recording, on the theory that they can always avoid being recorded by terminating the conversation. Be careful of recording conversations, whether on the telephone or in person, without the other person’s knowledge. This may be legal in some situations in some states, but it is illegal in other situations and in other states. There are federal and state laws against secret wiretapping and recording, and you don’t want to run afoul of them. Also, judges often don’t think much of people who make a habit of secretly tape recording or videotaping other people.

- *Keep a diary or calendar or ledger or log of significant events, or otherwise document them.*

Because family court cases can drag on for months or even years before coming to trial, the parties may have great trouble recalling in

their testimony the details of long-ago events and conversations. What you record and how (whether in a diary or calendar or other format) depends completely on the issue. If the issue is how many nights a month the child spends with each parent, keep track with a calendar. If the issue is whether child support payments have been made, keep a detailed ledger, and keep all documentation. If the issue has to do with your or the other parent's compliance with a court-ordered visitation schedule, keep a diary showing the exact days and times the child was picked off or dropped off (or wasn't picked up or wasn't dropped off).

Recorded Messages

"Never say anything on the phone that you wouldn't want your mother to hear at your trial." — Sydney Biddle Barrows

Our caution about secretly tape-recording conversations doesn't apply to recorded messages that the other party chooses to leave on your answering machine or in your cell phone's electronic mailbox.

Sometimes the recorded messages that people leave for others while angry or drunk, or both, can be powerful evidence. If the other party leaves you such a message, don't hesitate to use it if you need to.

Since the other party recorded it voluntarily, you can't be faulted for using it in court. In terms of persuasiveness, one 30-second incriminating message in the other party's voice can easily be worth 30 minutes of any other testimony.

Not too long ago, I presided over a contempt motion in which the issue was whether the ex-husband had complied with a requirement in his divorce judgment that he make good-faith efforts to sell the former marital residence, so that the net proceeds could be split. After the ex-husband was served with the ex-wife's paperwork he called her and left the following message on her answering machine:

"Hi. Do you want to know my opinion about you? I think you're a fat f***ing pathetic fat f***ing c***. All you are is a money grabbing whore. Get a f***ing life.

[Three similar but worse sentences are omitted, as it is impossible to edit them so that they can be printed in a book for a general audience.]

Yah. That's right. You f***ing c***. I'm talking to you fatty. Eat another f***ing doughnut. You f***ing shut your f***ing mouth. All right."

The ex-wife brought the answering machine to court, so I got to hear the message in all of its unedited original glory. It was bad enough that the ex-husband chose to say these deeply offensive things, but to leave the message on a machine, so the original stupidity could be proven beyond any doubt was mind-boggling. Needless to say, the

contempt motion was granted, and I appointed a special master to sell the property.

What was he thinking? — J.D.K.

At the same time, don't go overboard on submitting confirmation and documentation as evidence to the court. Often it turns out that the e-mail messages, calendars and diaries that a party has kept aren't needed. If yours aren't needed, don't submit them to the court anyway. Every judge can tell stories of being presented with reams and boxes of documents by a party that has minutely confirmed and documented everything that ever happened between the parties. The drawback to this approach is that important information or documents may be buried and lost in a mass of triviality. If you have too many documents with you, you may have trouble finding what you need. All family court judges have sat and watched parties (and sometimes watched lawyers) rooting through piles of paper fruitlessly looking for the one document needed. Some judges are a lot less patient with that than others. Spare yourself that experience by focusing on what you need to prove your point and respond to the other party's points.

Keeping a Diary of Events

The issue was how often the child stayed overnight at each parent's home. Mom testified that Dad was not giving her the visitation she was supposed to have under the court order. Dad, who provided all transportation because Mom's driver's license had been revoked, testified that he followed the court order exactly in dropping off or picking up the child at Mom's home. He also produced a calendar on which he had written the exact times he had dropped off or picked up the child on the dates in question. When Mom pointed out that anyone can write anything on a calendar, Dad brought out turnpike receipts that showed he had exited or entered the turnpike at Mom's city at times and on dates that corresponded to his calendar. Mom was speechless.

When I told Dad how impressed I was with Dad's evidence, Dad said, "I knew it would come down to my word against hers otherwise." — A.M.H.

Identifying All of the Topics and Issues Involved in Your Case

A critical step in preparing to represent yourself in family court is to make sure you understand what things will need to be addressed in your case. Once you have identified all of the things that will need to be addressed, you can decide what your viewpoint is on each of them.

Here is a list of the issues that may be involved in a family court case.

It is intended to help you think through the areas that you and the other party may need to either agree on or ask the court to decide. Not all of these issues are involved in every case.

If there is a child or children ...

• **Decisions and involvement regarding the child's education, religion, health care and other areas:** Usually parents of a child share the authority to make major decisions about the child's upbringing in areas such as education, health care, and involvement in religion. This approach means that parents are expected to work out any disagreements together and come to a joint decision. In other cases, the court orders joint decision making in some areas and assigns exclusive authority to one parent to make decisions in other specified areas. In exceptional situations, one parent gets all the decision making authority. Which approach is right for your case? Will major decisions be made jointly between the parents, or will one parent have exclusive decision-making authority in all or some areas? If one parent has exclusive decision-making authority in any or all areas, what input, if any, is the other parent entitled to contribute? Will both parents have full access to school and medical records? Will both parents be participating in parent-teacher conferences, doctor's appointments and other events involving the child?

• **Custody and visitation:** Sometimes parents don't need the court to define a specific schedule for the child because the parents want to stay flexible and can agree on who has the child when. Are you and the other parent likely to agree on everything? If not, what decisions will you be asking the court to make? How will the child's time be shared between the parents? Will it be equally shared? Will one parent have the child during the week while school is in session? How much visitation will the other parent have? What is the schedule during the school year? During the summer? During school vacations? On holidays, birthdays and other special days? How will pickups and drop-offs of the child be arranged? Who will provide transportation for the child on what days? What happens if the schedule has to change for some unexpected reason? Is there a fallback plan? What about telephone contact between visits—is there a need to define how much will be allowed? E-mail contact?

• **Child support:** State family laws prescribe what child support is due in different situations, and provide for child support to be reviewed on request of either parent every few years. Issues can include: Who will be paying whom how much in child support? How often will it be paid? If there are child care costs, how will those be shared and who

pays the child care provider? Will child support change in the future and under what conditions? When can either party ask for child support to be reviewed? Will the parties be exchanging proof of income, such as pay stubs and tax returns, and if so, how often?

· **Medical, dental, hospital, pharmaceutical and other health-related expenses for the child:** Who will carry health insurance for the child? How will the cost of health insurance for the child be shared? How will co-pays and deductibles be shared? If one parent is asking to be reimbursed, what documentation is needed and how soon should it be sent? How soon should reimbursement be paid?

· **Child activities:** One topic on which parents sometimes disagree includes sports and other activities for the child. Sometimes one parent, without asking the other parent, schedules the child to participate in sports or other activities that fall during the other parent's time with the child. Sometimes one parent vetoes activities that the child really wants to pursue, or refuses to share in the cost. Who will decide on school and summer activities like camps, sports? Is one parent allowed to schedule the child for sports or other activities that fall during the other parent's time with the child? How will the costs of activities be shared? How will transportation be provided to and from activities?

· **Income tax exemptions regarding the children:** Sometimes state law awards tax exemptions automatically to a party receiving child support. Parents often agree to alternate claiming tax exemptions, or if there is an even number of children, the parents will share the exemptions. The issues are: Which party will have the right to claim tax exemptions for which children in which years? What if one parent does not earn enough to benefit from the tax exemption?

· **Parental communication:** Many parents do just fine in communicating with each other about children. Others have great difficulty or don't communicate meaningfully at all. In extreme cases, a parenting coordinator may be involved to help the parents communicate and resolve their differences. How good are communications between you and the other parent? Should there be any restrictions on communications, such as limiting communication to e-mail or telephone? What kinds of information are each parent expected to provide the other about the child? Should there be a procedure for resolving disagreements? Should you and/or the other parent engage in parenting education or counseling to help improve communications?

· **College education for children and/or spouse:** Child support usually covers children only until they become adults by law. State law defines the age at which a person becomes an adult. Some states authorize their family courts to order a parent in a divorce case to pay for college educational costs even after children are adults. The same holds true for a spouse's future education. In states that do not grant their courts that authority, neither party can be made to pay for college, although the parties can still enter into a contract to pay. Sometimes one parent will forgo or reduce a claim for alimony if the other parent agrees to pay for college. If that agreement is included in the divorce judgment, it becomes a court order, even though the family court could not have ordered the parent to pay for college without that agreement.

If you and the other party are married, with or without children ...

· **Alimony/spousal support:** All states allow a spouse to request alimony (called spousal support in some states) from the other spouse. Spousal support consists of regular payments by one party to the other after the divorce (and in some cases, while the divorce case is working its way through the court process). What will be your financial needs and resources after the divorce? What will be the other party's financial needs and resources? Will you need support and, if so, how much? Will the other party be asking for you to pay support and, if so, how will you respond? What amount of support can you or the other spouse afford to pay?

· **Medical insurance for a former spouse after the divorce is final:** If one spouse's insurance policy has covered both during the marriage, the other spouse can continue coverage for a limited period of time. Will you or the other spouse need that continuation of coverage after the divorce?

· **Life insurance policies to replace child support payments, alimony/spousal support payments, and/or property payments in the event of death:** When one party is liable for alimony, child support or other future payments to the other, sometimes the family court requires life insurance covering the party who will be making payments, in case that party dies before completing the payments. A life insurance provision should specify how much coverage is required; who owns the policy; who must be named as beneficiary of the policy; who is responsible for paying policy premiums; and what proof of continuing coverage must be provided. Will there need to be life insurance coverage? In what amount? On whose life? Who will be the beneficiary? If the life insurance is for the benefit of minor

children, what adult should be named as beneficiary to manage the life insurance proceeds for the child?

- **Restoration of a former name:** If a wife takes her husband's last name at the time of marriage, the family court in a divorce judgment can restore the wife's birth or maiden name. In some courts, either party can request a change of last name.

If you and the other party have property to divide...

- **Property inventory:** Most family courts require the parties in a divorce case to prepare and exchange a list of all property that either of them owns, or that both of them own together, including real estate, bank accounts, investments, retirement assets, household furnishings and other forms of personal property. Usually both parties must also indicate what they believe the various items of property are worth. Even if the court does not require it, you should make a list of property, and ask the other party to do the same. The discovery process available in any family case gives you the authority and procedure to make that request to the other party. Review your and the other party's property inventory list carefully. Are any major items missing from either list? Are there major differences in the values you and the other party assign to property? Do you and the other party agree on ownership of property—whether property is owned together or separately, and if separately, by whom? Those discrepancies in value or in ownership may turn into contested issues in your family case.

The Omitted Property Problem

If the divorce judgment fails to state who gets a major item of property, the parties may have to come back to court to have the divorce judgment amended to clarify ownership of the property. One way to avoid the "omitted property" situation is for the divorce judgment to include a catch-all clause for property, such as:

"Any property of any kind—tangible and intangible—not expressly awarded by another provision of this divorce judgment is hereby awarded to the party in possession of that property, or the party in whose name the property is titled or registered."

The intent is to capture every kind of property, whether it can be physically possessed or not, but if one party has possession and the other has title, then a clause of this kind will create a conflict. The better approach is to be sure that the divorce judgment covers everything, and is specific as to property of any significant value.

- **Division of real estate, transfers, refinancing, deeds:** If you or the

other party own any real estate, or if you own a home or other real property together, the family court will have to decide which party will be granted the real estate, and whether the other party will be compensated for that party's ownership interest. Even if only one spouse owns the real estate, the other spouse may be compensated for contributing to the owner's equity in the property. For example, if the non-owning spouse has contributed to paying down the mortgage balance or to the cost of improvements that have enhanced the value of the property, the owner may be required to pay the non-owning spouse for the amount by which the contribution has enhanced the value of the property to the owner.

Also, if both parties are on the current mortgage, and the property is being granted to only one spouse, the other spouse will need to be relieved of liability on the mortgage. This can be done if the lender agrees to delete the other spouse as a borrower liable for the debt, but more commonly the spouse getting the property has to refinance under their name alone, so as to eliminate the other spouse's liability. The divorce judgment should set a deadline for refinancing and also should spell out what happens if the deadline is not met. In that event, the family court may well order the property sold if the party who has been granted it fails or refuses to refinance or otherwise eliminate the other party's responsibility for debt on the property.

Finally, any transfer of real property has to take place by a deed or the equivalent. In some states, a divorce judgment awarded title to real property operates as a deed, but the party who is getting the property is usually responsible for preparing a deed, if one is required for the transfer to be completed.

- **Miscellaneous financial assets:** One step parties to a divorce sometimes forget is to include everything that either party owns in the divorce judgment. Sometimes parties overlook property that either one has inherited, on the assumption that it doesn't need to be itemized in a divorce judgment. Sometimes parties have stocks, or limited partnership interests, or other accounts that they forget to tell the court about, thereby creating a potential "omitted property" problem.

- **Debts:** Just as a divorce judgment should address all of the property that the parties own, whether together or separately, it also should address all of the parties' debt, whether it is joint debt—meaning owed by both parties—or separate debt. There are three components to the debt provisions. First, the debt needs to be identified in terms of the creditor and the amount. Next, the divorce judgment should state

which party is responsible for what debts. Finally, the divorce judgment should spell out what happens if the responsible party fails to take care of the debt as required.

- **Pensions, IRA accounts, 401K transfers, Qualified Domestic Relations Orders:** A divorce judgment needs to spell out how each party's retirement assets (including future payments from pensions and annuities) are divided.

- **Tangible personal property including furniture, furnishings, art, and collectibles:** A divorce judgment should cover all items of tangible personal property owned by either party, even if it is clearly not marital property. Major items should be listed specifically. Generic items of ordinary value can be described in generic terms, such as "each party is awarded the furnishings or furniture in that party's current residence," assuming both parties know and agree on what is covered in a generic description.

- **Motor vehicles, including trailers and boats:** The divorce judgment should specify who is awarded what vehicles and accessories, whether or not the items are marital property. Also, any debt such as a car loan that goes with a vehicle should be mentioned. Usually, whichever party is being awarded a vehicle also is assigned responsibility for paying any debt owed on that vehicle.

- **Tax filings and tax liabilities:** Parties to divorce cases may owe income tax, property tax, and capital gains tax for sale of the property. Sometimes the divorce judgment will call for the parties to file a joint tax return if they can, because joint tax filings are often to both parties' advantage. If either party refuses to file jointly, the family court can require that party to reimburse the other for any additional tax liability owed as a result of separate filing. The family court also can assign responsibility for amounts due for taxes, penalties and interest for past tax years.

Usually the family court assigns responsibility for taxes to whichever party received the benefit of the income or sale on which the taxes are due.

- **Bankruptcy issues:** Certain obligations such as alimony and child support are not dischargeable in bankruptcy, meaning that they do not go away even if the party liable to pay declares bankruptcy. However, other obligations, such as responsibility for a debt, can be discharged. It is common for one spouse who is liable on a mortgage loan to be relieved of any further obligation on the loan as a result of filing

bankruptcy, leaving the other spouse liable for the entire balance due, unless that spouse also declares bankruptcy. A family court can help remedy this through an award of alimony.

Keep the Alimony Door Open

In our state and some other states, if alimony is not awarded in the divorce judgment, it can never be awarded later, even if the parties' situation changes and it becomes justified. To keep the alimony door open, some parties request "nominal support" of \$1.00 per year, and sometimes they agree that each should be awarded that dollar of nominal support from the other. In our state, what this does is allow for real alimony to be awarded if the situation justifies it later. If you live in a state with a similar law, consider asking for nominal support even if you don't want or need alimony now. That way, if you need it later, you can come back to court. Also, if the other party declares bankruptcy and you wind up being stuck paying all of a joint debt that the other party was supposed to pay, you can go back and ask for reimbursement through alimony.

· **Attorney fees:** Another issue that often comes up in divorce and other family court is how the parties' legal fees will be paid. Are you and the other party each going to be responsible for your own legal fees, or will either party be paying some or all of the other party's legal fees?

Different states have different rules about payment of attorney fees. The usual rule outside family court is that each side pays its own attorney fees, unless a contract or law provides otherwise. In family courts, state laws vary as to payment of legal fees. However, in most states, the family court can require either party to pay some, all or none of the legal fees incurred by the other party. The family court can make one party pay the other party's legal fees if the other party wins most or all contested issues, or if the other party has far fewer financial resources with which to pay attorney fees.

Some family courts allow a party to ask for the other party to pay attorney fees at or near the beginning of the case. Usually this request is made when there is a big disparity in the parties' finances, and the less well-off party would likely not be able to afford an attorney at all unless the other party contributes some or all of that expense. A more common situation is when one or both parties request attorney fees at the end of the case. A party asking to be reimbursed for some or all attorney fees usually must make the request before the case comes to trial, although the judge may not act on the request until after all other issues have been decided.

Proving attorney fees is usually a matter of submitting the attorney's bills. Attorney fees must be fair and reasonable, so if the amount of attorney fees is challenged, the attorney may need to present some support for the request.

- **Other fees:** Other fees that can be an issue are the fees charged by a guardian ad litem, an appraiser, a physician, a counselor or other person with expertise. Expert witnesses often charge very steep fees for testifying in a case, triggering a dispute about who is responsible for such fees.

- **Orders Limiting Contact and Behavior:** Should there be any limit on contact between you and the other party? Should you and/or the other party be ordered not to say bad things about the other? Some divorce judgments and other family court orders limit or prohibit contact between the parties. Sometimes the only contact allowed is contact relating to a child of the parties. Sometimes judgments and orders also include non-disparagement clauses, in which the court orders each party not to disparage or criticize the other. None of these provisions is typical—they usually are seen in cases involving a higher than usual level of conflict, or else abusive behavior by either or both parties against the other.

How Specific Does Your Court Order Have to Be?

Does a divorce judgment or other court order defining the rights of the parties have to spell out even the most particular details, such as who gets which spoon, or who gets which family photograph, or the exact time and place at which a child is picked up or dropped off by one parent or the other? There is a right answer to that question and the answer is...it depends.

It depends on how well the parties are able to work things out by agreement. Sometimes parties can agree on everything, sometimes they agree on nothing, and sometimes they agree on some points but not others. Sometimes the parties don't communicate. If the parties can't agree on how to divide the spoons, or can't even communicate on how to divide the spoons, then, yes, the divorce judgment will have to specify which party gets which spoon. Similarly, if one party wants the child to be dropped off or picked up in the driveway and not in the house, then, yes, the court's visitation order will have to spell that out. On the other hand, if the parties agree that whoever has a particular spoon can keep it, or that pick-ups and drop-offs will be arranged for the parties' mutual convenience, then the divorce judgment might say simply that the parties have already divided their personal property and each will keep what is in that party's possession, or that exchanges of the child will occur as agreed.

Why are we discussing the content of a divorce judgment now, as opposed to later? Because while your case is moving through the court process, you need to decide on what you are asking the court to do. In deciding what to ask for, think about how much detail you need the court to provide. Asking yourself questions like these can help: Are you and your spouse or partner able to communicate like reasonable adults? Can the two of you negotiate disagreements without either or both getting so angry or upset that agreement becomes impossible? Is there an imbalance between the two of you in terms of power and control? Is someone bullying someone else? Your answers to such questions will shape what you need to ask of the court. If you and the other party can work things out fairly and reasonably on your own, a flexible court order may be better for you—detailed requirements are limiting. But if you aren't comfortable trying to negotiate with the other party, you may need a detailed court order that spells out just what is expected and leaves little or no room for argument. In that case, you should be prepared to tell the court what you are asking, in detail.

Deciding What to Ask For

Whether you have a lawyer or not, once you become involved in a court case, you will need very quickly to develop a point of view on what you are asking the court to do for you. Do you or don't you want to try to keep the house? Are you or aren't you asking for alimony? How much time do you want with your child? The family court process often demands that people make very big decisions about the future without much time or opportunity to reflect.

If you are representing yourself in a family case, you may be unclear as to what to ask for in court. You don't want to be unrealistic, but at the same time, you shouldn't give up what you are entitled to. How to decide? If you haven't thought things through, you may make big and long-term mistakes, by agreeing to a bad settlement, or by turning down a good settlement and having the judge decide against you after a trial. The best way to avoid feeling pressured and making bad decisions is to think things through in advance and develop a good, realistic viewpoint on every aspect of your case.

The best way to know what to ask for is to understand how the family court judge will make decisions on various issues, and then apply that framework to your own situation. Why? Because otherwise you are guessing—shooting in the dark—because you don't know how the court is likely to respond to the evidence you and the other party will be presenting.

The Creditor Couldn't Care Less about the Divorce Judgment

Juliet and Romeo were both liable to the bank on the mortgage on their house. They represented themselves in their divorce, and the divorce judgment said that Juliet got the house and was responsible for mortgage payments. A couple of years after the divorce, Juliet stopped making monthly mortgage payments. The bank sued both of them to foreclose on the mortgage. Juliet lost the house and went bankrupt. Romeo not only lost his excellent credit rating but also had to pay off the balance left on the mortgage loan after the foreclosure sale.

What should Romeo have done? Back when they got divorced, he should have insisted on a clause in the divorce judgment requiring Juliet either to refinance the loan and mortgage within a few months of the divorce or else put the house up for sale.

When husband and wife are both liable as borrowers on a mortgage loan, or a credit card debt—meaning that it is “joint debt”—it is common for the divorce judgment to spell out which of them is taking responsibility for that loan or debt. What divorce parties sometimes forget is this: That type of provision has no binding effect on the creditor bank or finance company, unless the creditor has agreed to it. Unfortunately, it commonly happens that, when the ex-spouse whom the divorce judgment assigns responsibility for a joint debt fails to satisfy that responsibility, the other ex-spouse is required to pay or suffers damage to her or his credit standing. This is why the divorce judgment should specify what happens if a party fails to satisfy a debt as required by the divorce judgment.

Usually the best recourse is to require the joint debt to be refinanced within a fixed deadline and, if that doesn't happen, for the property to be sold. If the property is worth less than the debt—as often happens with vehicles and sometimes homes—selling it can still leave a “deficiency”—a balance due on the loan. If the party who is not responsible for the debt winds up having to pay the lender, that party is entitled to reimbursement from the party who is responsible, but getting reimbursement is sometimes not easy.

As to children, the judge follows what is in the best interests of the child. As to property, the judge decides what is fair and equitable—sometimes, but not necessarily, equal but at least equitable. As to alimony, the law may limit what is available if the marriage has lasted only a short time, but otherwise the judge can do what is necessary to enable each party to survive financially after the divorce.

Understanding the rules of law that the judge will use in deciding each disputed area of your case, and then applying those rules to the facts of your case, is the best way to predict what the judge will do. If

you know which judge will be deciding your case, your lawyer may know the judge from previous cases, and thus give you an even more specific idea of how that judge tends to view particular situations or to decide particular issues.

In deciding what to ask for, do your best to put aside emotional reactions to the situation and the other party, because they will only cloud your thinking. The judge will not be reacting emotionally; the judge will not be out to punish anyone. Thinking like the judge is your best chance of coming up with a realistic view of what to ask for in court. Ideally, you won't short-change yourself by asking for too little, nor will you risk appearing greedy by asking for too much.

Well, I Think I'd Like to Change My Name, Too!

We can't resist recounting an amusing tale—entirely true—about a name change.

One of our colleagues was handling an uncontested divorce. Husband and wife happened both to be in jail at the time, but nothing says you can't get divorced in leg shackles. The jail van brought them to court and the case went like any other uncontested divorce. The judge's last question was whether the wife would like to take her birth name (maiden name) back? The answer was yes. The judge made a note and said, "That covers what I need to ask you. Is there anything else?" The husband said, "Well, while we're at it, I'd like to change my name, too."

The judge thought about it a moment. The divorce laws are gender-neutral, so he said, "I guess I can do that. What is your new last name going to be?"

The man told him. It wasn't a common name, so the judge asked, "How do you spell that?"

The husband shrugged. "You tell me."

Another Name Change Story: Nobody Owns a Name

I handled a divorce case that I thought was uncontested, but turned out not to be.

The last question I asked was to the wife: "It looks as if you took your husband's last name when the two of you were married. You can either keep that name, or take back your previous last name."

She said, "I'll just keep the name I have now."

To my surprise, the husband spoke up. "Well, I want her to take back her maiden name. She took my last name when we got married, and now that we are getting divorced, I want her to give it back."

The wife started to protest but I jumped in first. "Mr. _____, I understand what you are asking, but I don't intend to make her give up her last name. I am not sure I even have the authority to do that, but even if I do, I don't intend to use it."

“I don’t want her using my name after the divorce,” the husband said. “You don’t own that name,” I replied. “Nobody does. Also, even if I were to make her take back her previous name today, tomorrow she could change it back to what it is now. So there’s no point in discussing this.”

He dropped the subject and I granted the divorce.

— A.M.H.

Chapter 3 on finances and property and Chapter 4 on children cover how judges evaluate different situations, and how judges make decisions in those areas. Chapter 8 covers how the court works. If you haven’t read a chapter covering the areas involved in your case, do that right now. Right now. Study those parts of our book that apply to your case, and then come back to this chapter.

If you understand how family courts make decisions, you will be in a much better position to evaluate the strengths and weaknesses of your viewpoint as well as the other party’s viewpoint. That, in turn, puts you in a much better position in terms of knowing what to ask for. When it comes to settling your case or going to trial, knowing how the family court makes decisions puts you in a much better position to make good decisions for yourself. Helping you make good decisions is the essential goal of this entire book.

Once you have figured out what you are looking for in your case, don’t change your mind for no reason, but adjust what you are looking for if needed as the case evolves. Decide what issues are non-negotiable—and there should be very few, if any, of those. Develop a negotiating position on every issue that you can, and be prepared to compromise.

Focusing on Your Evidence

Keep in mind that, unless you and the other party agree on absolutely everything, there is going to be a trial. It is quite common for divorcing parties to agree on nearly everything, and to have a short trial—lasting an hour or two—on the one or two points of disagreement. We have seen trials limited to who gets the child when during the Christmas break, who gets ownership of a cat (which is considered property), and how long a party has to refinance a mortgage on the parties’ residence.

Once you know what the contested issues are, and once you know what you are looking for on each of those issues, you are ready to focus on what evidence you will need to present at a trial, if your case

goes to trial, to convince the court to do what you are asking.

We suggest thinking about both what your evidence will be and how you will present it. You will likely be able to present most of what you need to through your own testimony, but other witnesses may be needed if you don't have personal knowledge of an important event or subject area. Also, if it comes down to your word against the other party's on a significant contested point, support from another witness—particularly someone whom the judge will see as being neutral, such as a teacher or counselor—may be helpful. You may also need documents to support what you are asking the court to do.

Starting well before your case approaches trial, there are many steps you need to take to get ready. For now, we suggest the following simple steps.

- Make a list of the contested issues in your case. Do this on a computer or word processor if you can, because you likely will be revising and expanding the list as the case progresses.
- For each issue, list the documents you might use to help prove your point on that issue.
- For each issue, list the witness or witnesses who have direct knowledge and who could testify.
- For each issue, list any documents or other materials that the other party has that you need to help prove your case. This list of documents and materials in the hands of the other party will form the substance of your *discovery request* to the other party. The next section discusses *discovery* in detail.

There is no harm in reading ahead to Chapter 11, which goes over the steps needed to prepare for trial. If you are confident your case will not go to trial, you may not need to worry about Chapter 11. However, before the trial, the court will be asking you to identify the contested issues as well as your witnesses and exhibits (the documents and other materials you will be presenting at the trial), so don't put off the tasks listed above for too long.

Using Discovery to Bolster Your Case and Get a Preview of the Other Party's Case

It's likely that your family court will allow you and the other party to request documents and information from each other. The court process by which parties exchange documents and information is

called discovery. Early in the case, the court may set a deadline for taking and completing discovery. Make sure you understand the deadline and get started with any discovery you need well before it expires.

We don't necessarily recommend discovery in every case. One reason is that many family courts require the parties to exchange discovery in specific areas. This mandatory discovery may cover everything you need to know from the other party. On the other hand, lawyers in divorce cases and other family court cases regularly use the available discovery procedures to fill in the gaps in their clients' evidence as well as to get an advance look at the evidence that the other party plans to present at trial. Self-represented parties have all the same rights regarding discovery, and in some cases they would benefit by taking advantage of discovery opportunities.

Mandatory discovery: Many courts require parties to exchange information and documents early in a divorce or other family case. For example, our Maine courts require each party in a divorce case to make a list of all property and debts and give the list to the court and the other party. Parties in family cases usually have to provide income information and often they have to exchange pay stubs. This mandatory discovery varies from court to court. Your court clerk's office should have the information.

Other discovery: Beyond any required discovery, the parties in a divorce or other family case usually have the right to submit requests for documents and information. Check the rules of your family court regarding what is allowed. Some courts set limits on what information and documents can be requested through discovery in divorce and other family court cases. Usually the court will set a deadline by which discovery must be initiated or completed. The court may also put limits on the quantity or method of discovery—how many documents can be requested or how many questions (interrogatories) can be asked.

There are two major purposes for discovery. One is to get documents and information from the other party that will help you prove your case. For example, if you are asking for child support from the other party, you may need to prove what the other party is actually earning, or is capable of earning if the other party is unemployed. The other party's pay stubs from former jobs can help you prove what you need to prove, but you will need to submit a written discovery request to the other party. The other reason for discovery is to give you a preview of the other party's evidence to be presented at trial. If the

other party wants full custody of your child, you can require the other party to provide you now with a copy of the documents the other party will be presenting in court at trial, but you must make the request in writing. You can also ask the other party questions in writing or orally about what information the other party plans to present as evidence to support their case.

The scheduling orders that many courts issue often fix a deadline for completing discovery. Neither party has to answer discovery requests from the other if the requests are submitted after the deadline, although parties often agree to continue exchanging information after the deadline. Also, either party can request more time from the court by filing a motion to extend the discovery deadline. Information that becomes available after the deadline can still be exchanged as it becomes available, and often must be, if a discovery request includes a requirement that answers be updated prior to trial.

Major Forms of Discovery

There are several ways for one party to get information and/or documents from the other party during discovery. The two ways or methods used most often are requests for documents and interrogatory questions. The two methods of discovery can be used separately or together. Some courts set limits on these and other types of discovery.

Requests for Production of Documents: The most frequently used approach is for one party to ask for documents in the possession or under the control of the other party. In many courts, this form of discovery is called a *request for production of documents*. The request must be in writing and must identify what documents are being requested specifically enough so the other party knows what is being requested. The document request can be for specific documents (e.g. “The April 22, 2011 bill of sale for the 1995 Chevrolet Stegosaurus minivan”) or it may be broadly worded to cover types of documents (“Any and all bank statements in the Plaintiff’s name for the years 2010 and 2011”).

Technically, the responding party has to make the original documents available to the requesting party for review, and the requesting party can make copies. In practice, as long as the documents are not too voluminous, the responding party makes copies and sends them to the requesting party along with a bill for the cost of the copies.

Interrogatories: Another widely used method for discovery is to ask the other party questions in writing, often called interrogatories. The

questions should be focused on issues in the case, and should be clearly written. Usually, the responses must be made under oath, and in writing as well.

Less common methods of discovery include:

Depositions: A deposition is an interview of a party or witness before trial. Depositions are usually held in law offices or sometimes conference rooms in public buildings. A court reporter administers an oath to tell the truth to the party or witness who is testifying and then takes down the questions and the answers given. All parties and lawyers usually attend depositions, but the judge does not. After the deposition, the court reporter makes a transcript, which can be filed with the court and used at the trial.

Requests for Admission: A request for admission is a request by one party that the other party admit that some fact is true. For example, one party might ask the other to admit that an item of property has a particular dollar value or that a particular dollar amount of child support is overdue. Requests for admission are not commonly used, but they are dangerous: If the party who is being asked to admit that something is true fails to respond in writing with a denial within the deadline, then the court will take the fact as admitted to be true. So if you receive a set of requests for admission from the other party (or the lawyer for the other party), don't ignore them unless you are willing to agree that every statement in the request is true. If you plan to contest the alleged facts, first make sure you know when your response is due. Then write out a response, admitting what is true and denying what is not true, and send it to the other party with a copy to the court, before the deadline.

What to Request in Discovery

What discovery requests you make will depend on what issues are raised in your case. This is why it is important to identify the issues early and to give thought to what evidence relating to those issues is in your hands or the hands of the other party. Your discovery requests should be tailored to the issues and to the documents or information that you want to get from the other party relating to the issues.

Responding to Discovery

Bear in mind the other party has the right to require you to answer questions and provide questions. If you get a request for discovery from the other party, make sure to find out when your

response to the request is due, and respond by the deadline. If you respond late or fail to respond, you could face a sanction from the court, such as an order preventing you from offering evidence at trial.

Responding to a document request usually means making the requested documents available for the other party to review. Usually courts also require the responding party to prepare a written response to a document request, stating whether the requested documents will be provided. Sometimes the parties will agree to bypass the review, and the party who is providing documents will have a photocopy made of each document and send the photocopy along with a copying bill. If there are so many documents that photocopy costs would be high, it is safer not to copy them, but to make them available for the other party to review and decide which of them should be copied.

You can and often will be asked to provide documents that you may not have in your possession, but that you have the right to get. An example might be a bank statement or a tax return. If it will cost you money to get the documents, you can usually ask the other party to pay the cost. You also can offer to give the other party a written authorization to release records, meaning the other party gets them directly. That way, you avoid the inconvenience and possible expense of getting the documents and still comply with the request. However, it may mean that the other party will have information about you that you don't have—which can lead to a nasty surprise at a trial!

Responding to interrogatories usually means preparing written answers under oath and sending them to the requesting party or lawyer. Some courts require the written answers to repeat each question immediately before each answer, so it is obvious what question is being answered. Most courts require the answers to be sworn to before a notary public, an attorney or other person authorized to administer oaths.

Usually, objections can only be based on lack of relevance—meaning that the requested documents or the questions have nothing to do with any issue in the case. The fact that the discovery request asks for documents that the requesting party already has, or asks questions that the requesting party already knows the answers to, are usually not successful grounds for objecting. The requesting party has the right to verify relevant information and to review relevant documents in the hands of the other party. If the discovery requests are so large, broad or otherwise so unreasonable as to amount to harassment, they can be objected to for that reason. Usually courts take a broad view of what is relevant, and expect parties to respond to discovery unless

what is being asked for clearly has nothing to do with anything or anyone involved in the case.

If a party does not respond at all to discovery requests—whether in the form of requests for documents or interrogatories—that party risks being penalized. Sometimes, the penalty takes the form of a fine payable to the other party. Sometimes, it means that the party who failed to respond cannot present evidence on some or all of the contested issues. In extreme situations, failure to respond to discovery can result in the delinquent party losing the case. So, the best course of action is to respond to discovery requests by providing what is being asked for, unless it is clearly irrelevant or unreasonable, and if so to formally object to the request *within the timeframe for responding*. If you don't object in a timely way, the court may decide you have waived—meaning lost—your ability to object.

The Judge Gets to See Some Discovery Responses

I once presided over a case in which one spouse's attorney requested to view the other spouse's checkbook registers as part of discovery, to determine what expenditures the husband had made during the separation. The other spouse had provided copies of the checkbook registers, but some entries had been "whited out" and the letters "NOYFB" written instead. At trial, the other spouse was forced to admit that the letters stood for "None of Your F****ing Business." That editorial insertion did not help the other spouse's cause!
— J.D.K.

In most courts, there is an ongoing obligation to update previous discovery responses if those responses are no longer accurate, and that obligation continues right up to and through the trial. In some courts, this obligation is automatic; in others it is only triggered if the party who made the discovery requests asks for an update of the response. If you are in doubt, update your responses if they are not accurate. For example, if you were asked for information about your employment and income, and if your earnings have changed or you have changed jobs, you should update the information you gave.

Preventing Discovery

A party who objects to a discovery request often has the option of asking the court for a protective order. If granted, a protective order prevents discovery from being requested in the subject areas defined in the protective order.

Compelling Discovery

If a party fails to respond to discovery requests, the requesting party can ask the court to require a response, through an order compelling discovery. Check your court rules for the procedure for making the other side provide the discovery you have requested. A party's failure to obey an order compelling discovery may expose the party to sanctions such as default if the party is a defendant, or as a dismissal of the case if the party is a plaintiff.

Moving the Case toward Trial

At some point after the beginning of the case, the case can be scheduled for trial—the time for the parties to present all their evidence and the court to make final decisions in the case. There may have been a hearing on temporary arrangements earlier, but a case is not considered ready for trial until after any court-ordered mediation and after the parties have had an opportunity to exchange information through the discovery process.

Family courts differ regarding how they schedule cases to come to trial. Some courts schedule cases on their own; others wait for the parties to decide when the case is ready. Many courts have clogged dockets and the parties in family cases may wait months and years before trial. If you haven't heard anything from the court for a long time, check with the court clerk and see whether there is anything you need to do to move your case along.

Family courts also vary in how they set cases for trial. Some courts schedule a case for trial on a specific date and time. Other courts schedule a list of cases for trial starting on a particular date and continuing for anywhere from a few days to months, and work down the list until all the cases have been resolved, either through a trial or by settlement. Trials take place when the court is ready to have them. Trial lists of this case are sometimes called "trailing dockets" or "trailing trial lists," because each case "trails" the case ahead of it on the list.

The Pretrial Conference: Narrowing the Issues before the Hearing

In most family courts, the court moves a case toward trial by scheduling what is often called a pre-trial conference. Some courts use other terms for it, such as pretrial hearing.

What makes the pre-trial conference so important is that it defines what will be presented at trial. Prepare for the pretrial conference by going over our checklist of issues and make a list of the areas you will

be asking the court to consider at trial. After you have listed the issues, think about how you will present your evidence at trial—which witnesses you will need to call, what exhibits—meaning documents and materials—you will submit to the court. You likely will not need to give the court a complete list of your witnesses and exhibits, but the judge at the pretrial conference will likely ask the parties how long they expect the trial to take. [\[26\]](#)

The Triage Process

Many family courts use a process often called “triage” to sort out which cases will need a trial and which will not. Even cases that don’t settle at the mediation phase often settle afterwards, as the reality of going to trial sets in. Some courts actually schedule cases for a “triage day,” which usually involves the parties and their lawyers meeting at the courthouse and attempting to resolve the issues by agreement. Some courts have judges and mediators available to facilitate settlement. Cases that settle are often finalized on the spot; those that don’t are put on the list of cases for trial.

Getting a Reality Check

Before you take your case to trial, and before you turn down a settlement proposal from the other party, it would be a good idea to make sure you are being realistic.

Our suggestion for doing that is to sit down for an hour or two with your closest friend in the world. Outline your best case and the other party’s best case on every contested issue. Don’t tell your friend what you will be asking for—just lay out the evidence that you and the other party are likely to present to the court on each issue—the children, the child support, the property, the alimony, etc. Take it issue by issue. Be fair and balanced to yourself and the other party in describing the evidence that the court is likely to hear.

After you have outlined your evidence and the evidence you think the other party is likely to present on each issue, tell your friend how family court judges decide that issue. After your friend has heard what the evidence is and how family courts would decide the issue, ask your friend for a totally honest assessment: Are you being reasonable or not? Ask your friend what the other party’s strongest arguments are. Be prepared for answers different from what you were hoping to hear. If so, don’t argue!! You have asked your friend to help you with a difficult task. If you haven’t convinced your good friend, how likely is it that you will convince a judge?

Last Steps before Trial

At various points during your case, the court clerk's office will need to contact you. Make sure they have your current mailing address and telephone number. If your case is waiting for trial on a "trailing list" make sure they have your work or cell number, or an alternative way to contact you in a hurry. You don't want to have your case decided against you because the clerk couldn't locate you, and you were defaulted.

Review the next chapter at least several weeks before you expect to have a trial, so that you can finalize your trial plan and organize your exhibits and questions for witnesses.

Finally, be prepared for a final round of negotiations "on the courthouse steps." We discuss all of these things in more detail in the next chapter.

Chapter 11

How to Present Your Case at Trial

“Going to trial with a lawyer who considers your whole lifestyle a crime in progress is not a happy prospect.”

— Hunter S. Thompson

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his chapter is about the nuts and bolts of actually taking a family court case to trial. The previous chapter covered the earlier phases of a family case, in terms of identifying issues, exchanging information, and deciding what to ask the court to do. This one explains in detail exactly what to do before and during the trial.

There are three parts to this chapter:

- **The Bare Bones** for those who only want the overview explanation of what to do in court.
- **The Uncontested Divorce** for those fortunate enough to have resolved everything by agreement without the need for a trial.
- **The Soup to Nuts Divorce** for those who need or want to take the time to understand in detail how to put their case together. If you are representing yourself in a complicated case, or if you are representing yourself and the other party has a lawyer, you may need or want to read the entire chapter.

We Only Argue When We’re Headed to Court

At the end of the pretrial conference, the judge looked at the parties—two people representing themselves in a family case—and asked them, “Are the two of you able to get along most of the time when it comes to your kids?” They looked at each other. The mother said, “It’s funny—we really do, except when we have a court date coming up.” The father added, “Then everything gets tense—that’s when we argue.”

— A.M.H.

Read this chapter early in your case, preferably as soon as it becomes clear that there are contested issues in the case that may, if they are not resolved, require a trial. Even if you think there is a good

possibility the case will be resolved by agreement without a trial, it is still a very good idea to do at least some preparation for the possibility of a trial. If there is a trial, you will not be caught unprepared, as so many pro se parties are. Even if your case winds up being settled without trial, it is still to your advantage to prepare as if there were going to be a trial. You likely will get better settlement terms if the other party perceives you as being ready and willing to go to trial unless you get what is fair.

Like the previous chapter, this one is written mainly for people representing themselves, but people who have lawyers may benefit also, by gaining a clearer understanding of the trial process.

All of what we cover below assumes you know what the contested issues are—in other words, whether your trial will focus on custody issues, or child support, or property, or all of those or other issues. Re-read the previous chapter if you aren't sure what the contested issues are. As part of the pretrial process, the court normally will identify the contested issues after hearing from the parties, and the pretrial order will usually state what issues are contested. Use the pretrial order as a guide to what the trial will be about.

Altered States: What Going to Trial Can Do to Families

One of the sad truths about family court is that a process intended to help families resolve their differences in an orderly, fair way sometimes becomes the source of conflict and tension. In large part, it is the nature of the process that causes this: It forces parties into a contest that will produce winners and losers. The way to win is to make yourself look good in the eyes of the court, and one way to make yourself look good is to make the other party look bad. Family court judges know this, and they often warn the people who come to court about the side-effects of taking a family case to trial. It isn't just the risk of losing the case, it isn't just the expense and effort and anxiety, that the parties need to think about.

Going to trial takes a toll on family relationships—on parents' ability to get along, on the trust between parents or between a parent and a child. Words are said, accusations are hurled, and tactics are employed during the trial process that can never be unsaid or undone. In the worst situations—what some judges and lawyers call the Armageddon cases—the damage is devastating and permanent. Parents and children who once loved each other cannot bring themselves even to speak to each other after the case is done. People go to trial either because they don't know or don't care about how damaging the process can be, or because they believe and hope that the benefits of going to trial will outweigh the damage done.

Taking a case to trial almost always puts at least a temporary strain on relationships if it doesn't do permanent damage. The reason is obvious—taking a family case to trial is engaging in conflict with someone else. It almost always changes how you feel about the person.

Sometimes, in the best of circumstances, people have a disagreement, and although they respect each other, they simply need a court to resolve it. They can limit their disagreement to the court setting, and they get along just as before. Occasionally judges see two parties who manage to maintain that level of detachment, but not often.

There also are situations when it can actually help relationships to go to trial. Sometimes standing one's ground on an issue can win respect. Also, if a particular issue has been the source of ongoing conflict and argument, resolving it through the court may actually improve the affected relationships.

In still other situations, there is not likely to be any future relationship, so the risk of damage doesn't matter. When parties don't have children, they may never have to deal with each other again after the case is over, so the need to preserve a future working relationship is small, unless the parties want to try to remain friends or anticipate being in contact with each other again through work or their social networks. When parties have children together, they are likely stuck with each other on some level for as long as they and their children are alive, and the need to preserve the relationship is much more important.

None of this is intended to discourage you or the other party from taking your case to trial if you must. These reflections are meant to get you and the other party to recognize, if you haven't yet, these intangible risks and benefits. Yes, you need to focus on the risks and benefits of the court process itself—might you do better settling your case without trial or might you do better getting a decision from the court? But you also need to weigh the risks and benefits in terms of your future relationship with the other party and with your children, if you have children with the other party. Is going to trial likely to be worth it?

In family cases, people sometimes are bent on trial regardless of the consequences: they need to punish the other party or to vindicate themselves. If the other party in your case is going to take the case to trial no matter what you propose in settlement, you have no choice but to go to trial as well.

So, go to trial if you must, but in fairness to yourself, the other party and any children involved, do it only after an honest and thorough assessment of all of the risks and benefits, including the intangibles we have summarized here.

How to Take Your Family Case to Trial with the Least Amount of Preparation and Effort

Can you skip the rest of this chapter and go with the “bare bones” approach? If you have no witnesses beside yourself, if you have no documents you want the court to review, if you don’t plan to question the other party, if you are willing to take the risk that your lack of preparation may result in your losing the case, or if for some other reason you don’t want or need to prepare for trial at the level this chapter outlines, you may (remember, we said *may*) be able to get by with the very minimum, and skip everything else in this chapter.

Even if you go with the minimum, we do suggest you at least scan the rest of the chapter so you know what is possible and what you are giving up. You can also pick and choose among the areas of preparation we suggest. By reading the rest of this chapter, you also will know more about the trial process and just that knowledge may raise your comfort level. Reading this chapter may also enhance your ability to deal with any unexpected developments in the courtroom. We also suggest you cover at least the steps outlined here. These steps reflect the minimum level of preparation for a family court trial:

- **KNOW IN ADVANCE WHAT THE COURT PLANS TO DO:** Check with the court clerk to be sure the court plans to conduct a trial, with testimony from the parties.
- **KNOW IN ADVANCE WHAT THE ISSUES ARE IN YOUR CASE:** Check your paperwork from the court and the other party so you know what areas will be covered in court.
- **FIGURE OUT WHAT YOU PLAN TO SAY:** We suggest writing out a list of the points you plan to make and bringing it with you to use as a reminder when you speak to the judge.
- **BRING WITH YOU ANY IMPORTANT DOCUMENTS:** If you think the court may want or need documents, bring them to court with you. You don’t have to show them to the judge, but you at least will have them available.
- **FOLLOW ANY COURT REQUIREMENTS:** Read court papers carefully and make sure you do what the court expects. If you have been given a subpoena to bring documents, for example, bring them as directed.
- **SHOW UP ON TIME:** If you don’t do anything else, come to court on

time. Allow yourself extra travel time in case something goes wrong. If you will be late, call ahead to the clerk's office to let them know you are on your way and when you are likely to arrive. Otherwise, you will likely lose the case, as well as the opportunity to present your point of view.

Your Mother Was Right: Appearances Do Count

Judges don't make decisions based on how parties dress or act in the courtroom, but they do form impressions of people that they can factor into their decisions. How you look, and especially how you act, in court can affect the judge's view of you and your case.

Things Not to Do at Court:

- Don't show off your body: Tank top t-shirts, exposed midriffs and the like are for the beach, not for court.
- Don't wear hats, hoods or dark glasses in the courtroom, except for legitimate religious or health reasons.
- Don't chew gum, tobacco or anything else.
- Censor your clothes: Don't wear clothes that have profanity written on them, or are otherwise inappropriate.
- While waiting at the back of the courtroom for your case to be called, don't chat, don't send or read e-mail or text messages, and don't surf the Internet.
- Don't make snide comments or swear.
- Don't mutter under your breath.
- Don't mumble.

Things to Do at Court:

- Show respect for the judge, court staff, the other party, witnesses, the other party's lawyer and everyone else in your words, tone of voice and actions.
- Follow directions, such as turning off your cell phone.
- While waiting at the back of the courtroom for your case to be called, sit quietly and pay attention to what is happening at the front of the courtroom: you will probably learn something.
- Speak clearly and keep your voice up.

If these rules seem more of a fit for a kindergarten class than for a courtroom, come see a busy court sometime. If you watch long enough, you will likely be amazed at how some people behave.

THE UNCONTESTED CASE:

Planning a Divorce Hearing for Those Fortunate Enough to Have Resolved Everything by Agreement Without the Need for a Trial

If your case is uncontested, you don't need to worry so much about preparing and presenting your case. Cases are uncontested for one of

two reasons: Either the parties agree on everything, or one party is absent and not participating. In either case, you likely will not have to be overly concerned about preparing your evidence and you may not need to call any witnesses beside yourself. In some cases, you may not need to go to the courthouse at all, if the judge is willing to act on the basis of an agreement signed by you and other party.

Even if your case is uncontested, there are still steps you need to take to be sure the case goes ahead as you expect. Here are some suggestions:

- If it is uncontested because you and the other party agree on everything, make sure that your agreement covers everything that is involved in your case. Sometimes people think they have an agreement, but they have neglected to discuss something important and it turns out that the case is contested after all.
- It is always a good idea to document the agreement before the court session. Writing down the terms of an agreement serves two purposes: first, it helps ensure that the parties really do have an agreement; and second, it serves as a record of the agreement, in case recollections differ later on as to what was agreed to. It isn't critical to write the agreement down ahead of time because the court may make its own record or recording of the agreement, but it can't hurt.
- Check with the court clerk in advance regarding what the court will need and who has to be present for an uncontested hearing. If your divorce case is coming to court for an uncontested hearing, most courts will require at least one of the spouses to attend in person, and some courts may require both to attend. On the other hand, if you and the other party are changing the terms of a divorce judgment by agreement, and you have provided the court with a signed agreement that clearly spells out what is being changed, the judge may be willing to approve the change without any court hearing, meaning neither party needs to come to court in person.
- If only one party needs to attend the uncontested court hearing, and the other party offers to go so you don't have to, you can accept or decline the offer. Whether you should go depends on whether the other party can be trusted to present the terms of the agreement to the court in the way you expect. If you have faith in and trust the other party, you may decide not to go, but if you don't trust the other party, thank the other party for the offer and go anyway.
- If your case is uncontested because the other party is not

participating in the case, you need to be sure you can show that the other party has been properly served with court papers and has failed to respond. You may also be asked by the judge whether you have notified the other party of the court hearing, and you should be prepared to respond.

· If your case is uncontested because the other party is not participating, you may still need to provide evidence to support what you are claiming. For example, if you are asking for custody of your children, or if you are asking for alimony or child support, be prepared to justify and support your request. Just because the other party has not shown up to court does not automatically entitle you to get everything you want. The judge still must determine that your requests are appropriate. For example, you still must show that it is in your children's best interests to be in your custody, and that the property order you are asking for is fair. If the other party is absent, this should not be hard to do, but it still needs to be shown.

SOUP TO NUTS:

A Step by Step Guide for Taking a Fully Contested Case to Trial

The rest of this chapter provides a detailed guide on how to prepare and present your case. If it seems like a lot, it is. Preparing and presenting a contested case for trial is a lot of work. We don't necessarily recommend that you follow every single step outlined below—some may not even apply to your case, and you may not have the time or resources to accomplish all of the steps that do apply. If you can't accomplish all of the preparation tasks we suggest, don't worry too much. Doing even basic preparation will enhance your presentation in the courtroom.

Make Up a Trial Preparation Checklist

As soon as it becomes clear your case is going to trial, take that calendar you have been using as a diary and log, and update it with a schedule for getting your case ready for trial. We suggest that you start the checklist now because there may be steps you need to take to get ready for trial weeks before the actual date for trial. If you wait until the day before, or even the week before, you may be caught unprepared.

A first step is to make sure you have calendared all of the dates and deadlines the court has set in connection with the trial. Usually the court will set a time frame for the trial itself, and also deadlines before

that time frame for the parties to exchange lists of witnesses and exhibits and take other steps. All of these deadlines are important and all should go in your calendar.

Trial Preparation Checklist

Here is a list of steps commonly required in preparing for a family case trial, organized chronologically. Many may not apply to your case; follow those that do.

As soon as the court tells you when your trial will be, in terms of either a specific date or of a timeframe (the month or week in which your case may be called to trial), start on the steps below to help ensure you are prepared for trial. You may want to transfer some of these steps into specific future dates on your calendar, but refer back to the checklist regularly. Note that the court deadlines in your case may require some modification of the suggested lead times below:

Steps to Be Taken As Soon You Learn of Trial Date or Trial Timeframe

- Put the date or timeframe in your calendar
- Check the court's orders for deadlines measured from the trial date and calendar them. For example, if you are supposed to notify the other party of your witnesses and exhibits within 10 days of trial, calendar those deadlines for at least 10 days before the earliest date on which your case could be called to trial.
- Check the court's orders for other deadlines and calendar them. For example, the court usually sets a deadline for filing requests to postpone trial (*motions to continue*) that also should be calendared in case you need a continuance.
- Make sure the court clerk has current contact information for you.
- Contact your witnesses and make sure they will be available to come to court when needed to testify.
- Check the status of discovery requests that both you and the other party have made to each other. Make sure you have responded appropriately, and that you have received the information and documents the other party is supposed to provide. Don't wait until the last minute to take care of either giving or getting documents or information. If the other party owes you documents or information, use your family court's process for forcing the other party to deliver them—this process is often called *compelling discovery*. See Chapter 10 for an overview of discovery and compelling discovery.
- Start outlining your case. (A sample outline and other ideas follow later in this chapter).

Steps to Be Taken When the Trial is A Few Weeks Away

- Take your case outline and assign to each of your witnesses (including yourself) the specific topics you intend to cover with each

witness. Outline your questions if necessary.

- Match up each of the documents you intend to use as exhibits with each of the witnesses (including yourself) who will be discussing them.
- Make a list of your exhibits and a list of your witnesses to provide to the other party by the deadline.
- Schedule times to meet with your witnesses.
- Check the court's deadlines to make sure you are in a position to meet all of them.
- If you want your trial to be recorded, check with the clerk to make sure recording will be provided, and if you need to make a written request, do so now.
- If you need to subpoena any witnesses, check with the court clerk on how to get the subpoenas and how to serve them. Remember many courts require a witness to be paid a witness fee and mileage in order for the subpoena to be valid.
- If you and the other party are required to confer before trial on reaching stipulations or marking exhibits, set up a time for doing so.
- Line up another adult to serve subpoenas as needed. Most courts prohibit the parties themselves from serving subpoenas.
- Make any further settlement proposals you would like the other party to consider, or invite the other party to make a proposal to you.
- If time permits, go over to court and sit in the courtroom where your trial will be held. If you know which judge is assigned to your case and if you haven't seen that judge at work, observe that judge in the courtroom if possible. Getting a sense of the courtroom environment and the judge's style is a terrific way to help prepare you for the trial.
- Prepare a proposed court order if you know how, or at least make a list of everything you will be asking the court to include in its judgment or other order.

Steps to Be Taken the Week Before Trial

- Check with the court clerk to verify the date and time for trial, and to find out which courtroom it will be in, so you can tell your witnesses when and where to meet.
- Meet or at least speak by telephone with each of your witnesses to explain what you will be asking them and what documents you will be showing them. Keep in mind that the other party may be entitled to ask the witness about what you said and showed the witnesses in preparing the witness to testify, so don't say or show the witness anything you would not want the other party to hear about or see.
- Have subpoenas served on your witnesses if necessary to ensure they come to court.
- Make sure your witnesses know how to get in touch with you if anything comes up.

- Make sure your witnesses know how to find the courthouse and the courtroom.
- If you have had a chance to observe the courtroom environment, explain the court environment to your witnesses, even down to what kind of attire would be desirable, so they know what to expect.
- Make sure you and your witnesses have a way to get to the courthouse. Not being able to find a ride to court may not be an adequate excuse for not showing up.
- Make four copies of all your exhibits: one copy is for the court file, one for the other party, and one for you. Some judges will ask for an additional copy for making notes on—that's what the fourth copy is for.
- If you have a large number of separate exhibits (more than a dozen), number them with exhibit stickers from the court clerk before you copy them.
- Finalize and document agreements on issues that can be settled; confirm the other party's position on issues that cannot be settled.
- Re-read the chapters of this book on courtroom etiquette and on the issues raised in your case. Re-read this entire chapter.

Steps to Be Taken The Day Before Trial (Or the Day Before That)

- Contact your witnesses and confirm everything in terms of when and where you expect them to come.
- Double check the court orders to make sure you have done everything the court expects.
- Go over your outlines for questioning witnesses, including your outline of your own testimony.
- Review documents you may be discussing in detail.
- Re-read your calendar, diary and log if necessary to refresh your memory.
- In reviewing materials to prepare to testify, keep in mind that in some courts the other party is entitled to review any document that a witness reviews in preparing to testify.
- Keep in mind that the other party may be entitled to review anything that you or your witnesses use to prepare to testify, and any documents you bring with you to the witness stand in court.
- Finalize your order of witnesses—decide who testifies when. Your witnesses may need to leave early or arrive late, so you may need to place them earlier or later in your presentation.
- Call the clerk to make sure the court schedule has not changed.
- Go over your entire checklist to make sure there are no loose ends.
- Try to relax, get a good night's sleep and remember—all you can control is the effort, and you have done your best. The outcome is not in your hands to control.

Outline of Your Overall Case

Some lawyers who handle jury trials start outlining their final argument to the jury many months before trial, before they even know when the trial will be held. Why? So they have a clear sense of what evidence they need to present in order to make the best possible case to the jury.

We recommend a similar approach to any party who will be taking a family case to trial without a lawyer. Plan ahead for trial. If you wait till the day before trial to plan, you likely will not be able to present your strongest case. Why bother going to trial unless you give it your best?

The best first step to take in preparing for trial is to develop an outline of what evidence you intend to present and how you intend to present it. Deciding what evidence to present requires you to understand what your case is about, and what evidence a judge will consider in deciding your case.

Here are the steps involved in preparing an outline of your case for purposes of trial:

- *Know what the contested issues are in the case:* The pretrial process should define what the issues are.
- *Know what your position is on each of the contested issues:* Well before the trial, you should have developed a position on every contested issue.
- *Know what evidence judges will consider in deciding each issues:* Other chapters discuss how judges decide particular issues in family court, and what evidence judges deem relevant to those issues. Read, if you haven't yet, the chapters that cover the issues involved in your case.
- *Make an outline, listing each issue:* If you can, use a computer or word processor so the outline can be expanded and revised easily.
- On your outline, under each issue you have listed, list each point you intend to make to support your position on that issue.
- On your outline, for each issue involved in the case, list the points you expect the other party to make. Under each of the other party's points, list the points you will be making in response.
- For each point you intend to make, both in support of your own case

and in response to the other party's points, list the witnesses (including yourself) who have personal knowledge of the events and facts covered in your point. List the documents that support your point.

If you follow all of these steps, what you have is a good roadmap of what you will be presenting at trial. You will know what evidence you intend to present, and what witnesses and/or documents you will use to present that evidence.

ROADMAP:

A Sample Outline of the Trial

Here is an example of what a roadmap for trial might look like. It identifies the issue; it identifies the major points you plan to make in court, and it lists the witnesses and documents that apply to each point. The custody and property issues are not yet filled in; the map for trial evolves over time. You should start it almost as soon as your family case starts; because it will help you get organized for settlement discussions as well as for trial.

INTERVIEW WITH

PROOF

1. Child's probability of future abuse and neglect compared with the other party's

2. Day medical visit history

3. Medical diagnosis and medical expenses

5. Day care bills, child's medical bills

Custody points: involvement, the high level of conflict and opposition

2. Child's living conditions where child was each night.

3. Medical expenses and child's medical bills for child's actual medical problems.

Property issues: child's medical expenses and purchase of house because

2. Child's medical expenses with no payment.

The analysis of the home's value is added if the value of the home is less than the value of the home's value. The value of the home is less than the value of the home's value. The value of the home is less than the value of the home's value. The value of the home is less than the value of the home's value.

This is an extremely simple table. Lawyers who prepare thoroughly for trial often create outlines running to many pages, breaking each issue into detailed points, and each point into sub points, until the outline has addressed every detail and specified which witnesses and documents will cover that point.

You don't need to use a table like this, but you likely will find it helpful to organize your thoughts into an outline. Your outline should do more than just identify issues or list witnesses. It should itemize the points you plan to make through your evidence, and the points made by the other party that your evidence will respond to. That approach will help you identify who and what you need to prove your case.

Identifying Who Your Witnesses Are and What Their Testimony Covers

When preparing for a family court trial, many people representing themselves seem to bring witnesses to court without a clear idea of what they will be asking their witnesses to testify about. This is backwards. Do the outline of your case first, and then focus on who your witnesses will be for each point contained in the outline.

Here are some guidelines for making decisions about witnesses:

- *You may be your own best witness:* Don't feel compelled to bring witnesses to your trial. It is not a numbers contest; the judge will be focusing on the strengths and weaknesses of each party's case, not on how many witnesses each party brings. In fact, presenting witnesses who don't have much to add can take away from the strong points in your own presentation. You also will usually do better telling your story in your own words, than trying to ask other people to tell it.
- *Make sure the witness can address a significant issue:* Don't bother recruiting witnesses to testify about minor details. Save your witnesses for major contested issues.
- *Make sure the witness has something to offer:* Sometimes witnesses really add nothing to a party's case, leaving the judge wondering why the court's time was wasted. Even worse, we have seen a party call a witness who actually gave support to the opposing party's case, leaving us wondering whether the party who called the witness had any idea what the witness would say. Make sure your witnesses all have something to say that is helpful and important or don't call them.
- *Make sure the witness can testify from personal knowledge:* For the testimony to be accepted as evidence, witnesses usually must have personal knowledge of what they testify to. This means the witnesses have actually seen or heard whatever events or conversations they will testify about. The hearsay rule prevents witnesses from simply repeating what they have been told.
- *Avoid unfriendly witnesses if at all possible:* You may be tempted, or

find it necessary, to call the other party as a witness, or a friend of relative of the other party. It is true that sometimes a party has no way to prove a significant contested point without calling the other party or an unfriendly witness. (An unfriendly witness is a witness who is identified with the other party, such as a close relative or friend of the other party). Calling an unfriendly witness really should be a last resort, because the witness may do more harm than good to your case. Only if the witness's testimony is critical to your case on a significant issue should you consider calling an unfriendly witness to testify.

- *Meet all deadlines for identifying and disclosing witnesses and exhibits:* Usually the court will set deadlines for the parties to notify each other and the court about who will be called as witnesses to testify at trial and what materials will be presented to the court at trial as exhibits. Read the court order carefully so you know exactly what information you need to give the other party about your witnesses and exhibits. Missing a deadline or providing incomplete information may cost you the opportunity to present the witnesses and exhibits you need to. As soon as you are notified of any deadlines, put them in your calendar and then follow them.

- *Make sure your case can be presented within the time available:* During the pretrial process, the court likely developed an estimate for the total length of the trial, based on input from the parties. Simpler trials may last only a couple of hours from beginning to end; more complex trials may take the better part of a day or even several days (or in unusual cases, even longer). Normally the court assumes each party will use half of the allotted time. If there is a guardian ad litem, the guardian's allotted time may come out of the parties' time. Because your time should allow for cross-examination and the testimony of your witnesses as well as yourself, plan on using no more than a third of the total time for the case on yourself and your own witnesses. Some judges are lenient on usage of time, but others are very strict. Getting a sense of your judge's style beforehand can be quite helpful.

- *Consider testifying first so you cover what you need to in the time available.* You are usually your own most important witness. Don't make the mistake of calling a lot of witnesses up front and leaving yourself too little time to testify. You may also find you don't need witnesses after you have made a thorough presentation. On the other hand, if there is a witness on a key point who cannot wait at court, consider calling that person first to make sure their testimony is presented.

- *Present the most important parts early in your own or a witness's testimony.* Just as good writing begins with a strong topic sentence, so it should be clear early in testimony why the witness is being presented.

Don't Cross-Examine an Unfriendly Witness Unless You Must

Judges regularly see parties and lawyers who do damage to their cause by cross-examining the other party or the other party's witnesses. On television and in the movies, witnesses break down on cross-examination and admit that everything they just testified to was a lie. In real life, cross-examination is often ineffectual and sometimes quite damaging to the cross-examiner. More often than not, cross-examination gives an unfriendly witness the opportunity to repeat or expand upon damaging testimony. Only if you have a specific need to question an unfriendly witness for purposes of supporting your case should you question unfriendly witnesses, either by calling them yourself or by questioning them on cross-examination.

Should your child testify?

Family court judges are very wary about allowing one parent to call a child as a witness against the other parent, and often discourage parties from doing so unless it is absolutely necessary. The reasons for judges' reluctance to hear children's testimony in disputes between the parents include:

- A child who testifies in a trial between the parents is being put squarely in the middle of the parents' dispute. Family court judges work hard to protect children against exactly that.
- Judges know well that a child likely will tell any parent what the parent wants to hear, especially if the child is mostly with that parent and not much with the other parent. A child's testimony may well be heavily influenced by the child's sense of what the parent wants the child to say.
- Judges know that very young children may not be able to give meaningful testimony.
- Judges also know that parents sometimes try to punish each other through their children.

If you plan to have your child testify against the other parent, be ready to defend and justify your decision. The best way—maybe the only way—to support your decision is to show that the child is the only witness who can testify based on personal knowledge about a

crucial contested issue. For example, if the contested issue is whether you or the other party committed abuse of some kind against the child, it may well be that the child is the only witness besides you or the other party who can testify about what did or did not happen, without violating the hearsayrule of evidence.

If you can't support your decision to have your child testify, the judge may well refuse to allow the testimony. The judge may in fact wonder why you want to put your child in the middle of your dispute with the other parent without a good reason. You therefore should not call your child as a witness unless you have a good reason to do so.

Preparing Your Witnesses to Testify

Every judge has seen cases in which a party (or even a lawyer) starts questioning a witness, and it quickly becomes clear that the party (or the lawyer) has no real idea of what the witness has to say, and may never have talked to the witness about the testimony.

Always try to meet or at least speak by telephone with your witnesses and go over with them what you plan to cover in your questions. There is nothing wrong with going over a witness's anticipated testimony before trial, as long as there is no coaching or other improper influence. The difference between witness preparation and witness coaching is the difference between finding out how a witness will answer a particular question and telling the witness how to testify. What you cannot do is suggest or advise that the witness answer any question in a way that differs from what the witness believes to be true. Obviously, anything resembling a bribe or a threat to a witness is also wrong and could actually be a crime.

Your first discussion with any witness about testifying should be early on, to confirm that the witness has first-hand information about the points you have in mind and is willing to testify. Shortly before the actual trial, speak with the witness again. During that discussion, go over the specific questions you intend to ask the witness, to make sure the witness's answers are what you expect them to be. If the witness has forgotten what the witness said to you before, you can remind the witness of the witness's own words, but you can't substitute your words. If the witness has made any written statements (such as letters, e-mail messages, or affidavits) you can show the witness what the witness has written previously to refresh the witness's memory on a particular point. If you plan to show any documents to the witness in the courtroom, go over the document with the witness beforehand and make sure that the witness's answers to your questions about the

document are what you expect them to be.

You also can go over with your witness the questions that you think the other party might ask, or at least the topics that the other party might bring up, during the other party's opportunity to cross-examine your witness during the trial. Going over both your questions and the other party's likely questions with a witness ahead of time does two things. First, it may mean the witness is better prepared to answer all of the questions because the witness has had the chance to think about them ahead of time. Second, it may help you assess whether calling that witness as part of your case is worthwhile.

Often a witness's testimony will be helpful to your position in some ways, and helpful to the other party's position in other ways. Such a situation calls for you to weigh the benefit of calling the witness against the harm of having the unhelpful information come out in court.

Outlines of Testimony

Once you have decided who (including yourself) will be your witnesses and what areas each witness will cover, we strongly suggest that you write out in advance an outline of all the points you intend to cover in each witness's testimony. An outline will help you cover everything and not leave anything out, and may also help you avoid repeating yourself. You may even check off points as you go. Include in your outline a list of the documents you are referring to, by their exhibit numbers. The outline can be as detailed or as general as you need. Some people need only a word or two to remind them of what they plan to say; others may need whole sentences. If you are too nervous to speak without a script, write out a script, but try to avoid reading from it throughout. It is boring to watch a person reading. The judge will likely be more interested in what you say if you are speaking to the judge, as if you were telling a story.

Outlining Your Own Testimony

Organize your own testimony in a logical way and avoid jumping back and forth in time or between topics. A good approach is to begin with background information on yourself and the other party, and your children, if any. Think of this as introducing yourself and your situation to the court. The judge may know almost nothing about you, the other party, your children and the history that brings you to the courtroom. How detailed you are in giving background and what you highlight really depends on the issues in the case.

After you have introduced yourself and explained the background, we suggest you cover what you need to on an issue-by-issue basis. We also suggest you tell the judge what issue you plan to focus on: “I would first like to discuss in my testimony the custody and visitation issues in the case.” Within each issue, we suggest your testimony might follow this sequence:

- What is the current situation: If the issue is custody and visitation—where the children have been living; how often they have seen each parent; where they are in school, and all of the other details of their present situation. If the issue is property—what property the parties own; whether it is marital or not; who is in possession of it now; how it was acquired, if that matters, and what it is worth.
- What changes if any are needed in the current situation: If the issue is custody and visitation—is the present schedule working for the children? If so, why? If not, why not? What changes would make it better? If the issue is property—is the current situation fair, or do changes need to be made to make it fair? Should the marital property be equally divided? If not, why not?
- What you are asking the court to do: Be clear on what you are asking the court to do. If the issue is custody and visitation—state whether you are asking for things to stay the same or if you are asking for changes. If the issue is property—explain what you propose for dividing the property.

Sample Outline of Testimony

Here is an example of what we mean about an outline of testimony. This is a very simple outline that touches only on major points. A more detailed outline would have lots of sub-points and sub-sub-points. The outline needs to be only as detailed as you need it to be, to know what you need to cover—not more detailed or less. You will note it includes references to exhibits (summaries, tax returns, etc.) at specific points. At those points, the documents listed would be presented to the court with a request they be accepted into evidence. Remember you may not be allowed to review the outline while testifying—you may only be allowed to look at it if you need to do so in order to remember your next point.

GENERAL:

- My Name
- Age
- Educational Background
- Working History, with Annual Earnings History
- Date of Marriage

- Places Lived
- Names and Ages of Children
- Any Special Medical, Educational Needs of Children
- Any Special Medical or Work Limitations on Myself
- Irreconcilable Differences (Plaintiff only)

ISSUES:

Custody

- My Role in Raising Children
- The Other Party's Role
- My Current Living and Work Situation
- How I Plan to Meet the Children's Needs While They Are With Me
- What Custody Arrangements is in Children's Best Interest and Why
- What I am Asking the Court to Do

Property

- Description of Property
- My Estimates of Value of Property (introduce summary list)
- What is Marital Property
- What is Non-Marital Property
- What Division of Property Would be Fair to Both Parties and Why?
- What I am Asking the Court to Order Regarding Property

Support

- Description of Each Party's Current Employment and Earnings (introduce W-2's and tax returns)
- What Child Support Arrangement Would be Fair and Why
- Why I Am Asking the Court to Order Alimony
- What My Future Expenses Will Be
- What My Future Income Will Be (introduce summary of anticipated expenses and income)
- What Amount I need for Alimony and for How Long
- What Amount the Other Party Can Afford to Pay
- What Amount the Other Party Should be Ordered to Pay
- What Alimony I am Requesting and for How Long

The outline you prepare will obviously be different than this sample. Probably it will be more detailed and refer to more documents. But there is no one right outline—it should cover what you need to have in order to testify.

Having suggested that you write out an outline or a script, we also strongly suggest that you prepare yourself for not being allowed to use them, at least as you planned. Witness testimony, especially about past events, usually must be based on the witness's own present recollection of what is being discussed. If you are reading notes, or a script or an outline as you testify, you obviously are not testifying from memory. Particularly if the other side objects to your reading

from a document as you testify, you may have to put it down and testify as best you can from memory. If you cannot recall a particular point—a date, a name, etc.—tell the judge you cannot remember and would like to refresh your memory by reviewing your outline or notes. Whatever you review, the opposing party is entitled to see it, a point you should definitely keep in mind in deciding what to include in your notes or outline or script.

Outline Your Questions for Witnesses

Make sure to make a list of the points you plan to cover with each witness, including yourself. Virtually everyone who comes to court is nervous in the courtroom, so you should expect that both you and your witnesses will be too. If you expect to be very nervous in the courtroom, you may find it helpful to write out your questions word for word. At least you should do an outline or list of the questions you want to cover with each witness. Use the list when questioning each witness.

If you plan to show any documents to a witness, include in your outline the name and, if you have it, the exhibit number of the document, at the place in the outline when the document is to be shown to the witness.

Most courts have rules on how questions to witnesses must be asked. Here are the basic ground rules for questioning witnesses:

Ask questions; don't lecture or testify: Probably the most common mistake made by pro se parties when questioning witnesses in court is that they tell their story instead of asking questions. While the witness just sits there, the party starts lecturing rather than asking questions. If the other party has a lawyer, this will definitely draw an objection, and even if there is none, the judge will likely tell the pro se party to ask questions instead of presenting testimony. If you want to present your own point of view, take the witness stand and testify.

Don't ask questions if you don't have any questions: The second most common mistake made by parties representing themselves is to feel they have to ask questions of witnesses when they really don't have any questions to ask. Sometimes parties bring friends or family members to court with them, and feel compelled to call them as witnesses even when they have nothing relevant to say. Also, pro se parties often feel compelled to cross-examine the other party's witnesses even though they really have no questions. When the judge turns to you after the other party has questioned a witness and says,

“Any questions for the witness?” you should answer, “No,” unless you have already thought of a question.

Do We Really Need to Say It? (Don’t Ask Stupid Questions).

Sometimes the questions people ask can be more damaging to the questioner than the answerer. In a recent divorce case tried before me, the husband, representing himself, asked his wife this question: “Now, when I took all your clothes and your daughter’s clothes and threw them onto the lawn, what was I thinking?” After a long pause, the wife answered, “I really don’t know.” And I, the judge, was thinking, “Now, when you asked that question, what were you thinking?”

— J.D.K.

Using Witness Statements Instead of Testimony

Often pro se parties in family court ask their witnesses to write out statements, and then bring the statements to court, hoping the court will consider them. Sometimes the statements are notarized. The rules of evidence that apply in most family courts prohibit judges from accepting written statements (whether notarized or not) as evidence, if there is an objection. The reason for this rule is based on the right to confront and cross-examine opposing witnesses. If you are considering using witness statements, check the rules of your court.

Even if your family court’s rules do not allow written statements in lieu of testimony, the judge may well agree to accept and consider a written statement from an absent witness if there is no objection from the other party. However, unless there is an agreement ahead of time (preferably written down by the court or the parties) about written statements being acceptable instead of live testimony, the best way to make sure that you can present important testimony from a witness is to make sure your witness comes to court, ready to testify.

Sometimes witnesses submit their testimony in writing instead of delivering it from the witness stand, but still come to court so they are available to be cross-examined—questioned by the other party. This usually involves an expert witness—such as a real estate appraiser—who has already prepared a written report and answers questions about the report. To save time, the written report is admitted into evidence rather than what could be the witness’s lengthy testimony about the contents of the report. Because the witness is available to be questioned by the other party, using the written statement instead of testimony does not violate the other party’s right to cross-examine.

Getting Witnesses to Court: Subpoenas

Your witnesses won't do you any good if they don't show up in court. It is your responsibility, not the court's, to get your witnesses to court, although you can use the power of the court to make even a reluctant witness come to court. The way to compel a witness to come to court is to hand a subpoena to the witness. A subpoena is an order from the court to be at court at the date and time shown in the subpoena. Subpoenas are usually available through the court clerk. Check the specific requirements of your court relating to subpoenas, because they may differ from the following description.

To take effect, the original subpoena with the seal of the court on it must be personally delivered to the witness. You may also be required to provide the witness with payment for mileage to and from court at the time the subpoena is served. Mailing or dropping off a subpoena usually will not be enough. In most courts the person delivering the subpoena must be an adult who is not a party to the case. So you may not be allowed to hand subpoenas to your own witnesses. To confirm delivery of the subpoena, the person who delivers the subpoena should complete the "return of service," indicating when and where the subpoena was delivered (or "served," to use the legal term).

Every subpoena must list the date and time when the witness is being ordered to come to court. If you have a definite date and time for your trial, just include those. If your court does not assign specific dates and times for trial, but rather time frames, it may be trickier. The subpoena may need to state the witness has to be available to come to court between X date and Y date, and will be notified as to specific date and time. Check with your court clerk if you are unclear as to how to complete the subpoena.[\[27\]](#)

If you haven't served a subpoena on a witness, the witness does not have to come to court. You can ask the court to postpone the trial to enable you to get your witness to court, but the judge may refuse if you haven't subpoenaed the witness. However, if you can present a return of service showing that a witness has been subpoenaed properly, the judge likely will delay the trial at least briefly and also can order the witness arrested and brought to court to testify. The witness can be held in contempt of court and put in jail if the witness deliberately disobeyed the subpoena.

Identifying and Organizing Your Documents to Use as Exhibits

This section discusses how to present exhibits to the court. An exhibit

is any document or thing that a party wants the court to consider as evidence. The rules of evidence, including hearsay, apply to exhibits as well as to witness testimony. In some courts, original documents are required. In others, photocopies can be used instead of originals. Even in courts that require originals, photocopies can be used if the parties agree. Always check on the rules that apply in your court. Also, make sure you follow any deadlines set by the court for notifying the other party of which documents you plan to present as exhibits.

Documents can be very persuasive as evidence. Instead of simply testifying that the other party engages in threats and name-calling, show the court the threatening and abusive e-mail messages the other party has sent you. In addition to testifying that you are not behind on your child support as the other party claims, show the court the cancelled checks that prove you have paid faithfully week after week. In addition to testifying that the other party has run up credit card debt with irresponsible, wasteful purchases, show the court the credit card bills. Submitting documents that prove the truth of your viewpoint can be very effective.

If You Forget to Bring Your Key Document to Court

Every family court judge has heard parties say they have proof of what they are saying, but they forgot to bring it with them to court. If you haven't brought the document with you to court, you can ask the judge to "leave the record open" and let you bring it to court later. Or you can ask the judge to wait for you to go home and bring it back. Don't be surprised if the judge refuses—one legitimate reason to refuse is that the other party would be denied the chance to respond to the document if you submit it after the trial.

Make sure to bring your documents to court; if you don't, you probably will lose the opportunity to present them. Even when parties bring documents with them, they may not use them effectively. Don't expect the judge to sort through and make sense of your disorganized boxful of cancelled checks or letters or bills. If you have more than a few documents to present, organize them thoroughly and number them. Sort them by issue first, separating the documents that relate to alimony from those that relate to child support, for example. This is because judges usually go issue by issue in deciding cases, so grouping all the documents you intend to present on a particular issue will help the judge understand your evidence. Within an issue, sort them by type of document or by date, whichever makes more sense in the situation.

In court, exhibits are referred to by number (or sometimes letter)

instead of by a description of the exhibit: “Plaintiff’s Exhibit 1” instead of “the letter dated March 29.” You assign the numbers to your own exhibits. You can (but don’t have to) number them in the order you will be presenting them during your case. Most courts use “exhibit stickers” that the court clerk will give you, either in the courtroom during trial or in advance. To “mark an exhibit,” just write the appropriate number on the sticker and put the sticker on the first page of the document (so it doesn’t cover up any important information). Often exhibit stickers have different colors for different parties (for example, yellow for plaintiff and blue for defendant). Getting exhibit stickers in advance, putting them on your documents, and numbering your exhibits ahead of time will save you time in the courtroom (and likely impress the judge with your efficiency.) You may also want to prepare an index of your documents, so that the judge can find a particular document quickly.

Here is a sample index:

Description	Number
Bank Check for \$300.00 payable to Richard Smith	1
credit card account bill, balance of \$1,344.26	2
Joint Federal Income Tax Return for Mary and Richard Smith	3
Etc, Etc, Etc.	

NOTE: Your exhibits do not need to be presented in their numbered sequence. You also do not need to worry if you decide not to use one or more exhibits.

Using Summaries, Lists and Tables

Judges greatly appreciate having voluminous information organized and presenting to them in a summary. Good lawyers often use summaries to shorten what would otherwise be extremely long and boring testimony, or to make clear what would otherwise be extremely confusing or voluminous information in documents. Summaries may not be necessary in many or even most cases, but when they are necessary, they are highly effective.

Here are two examples of how a summary can be used effectively:

- In John and Jane’s divorce case, John is asking for his child support obligation to be reduced based on the increased number of days and nights the child stays with him during the separation. Jane disputes John’s testimony that the child is with him half of the time. She has kept a diary for the past six months, in which she has made daily

notes of where the child stays. At trial, she goes page by page through the diary, telling the judge where the child spent each night. This tedious process takes 45 minutes, and at the end the judge has to add up how many overnights the child had with each parent.

Jane could have presented all of this information more clearly and effectively in five minutes, had she sat down with her diary and a blank calendar and marked on the calendar which days the child was with each parent. Or she could have typed up something like this:

OVERNIGHTS WITH MOTHER

~~Jan 27, 28, 29, 30, 31~~ 1, 10, 16, 24, 25, 26, 29, 30, 23, 24, 27, 28, 30
~~Feb 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31~~ 15, 16, 20, 22, 23, 13, 14, 17, 18, 19, 20, 24, 25, 26, 27, 28
~~Mar 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31~~ 1, 11, 29, 30, 4, 15, 26, 28, 29, 22, 23, 24, 25, 26, 30, 31
~~Apr 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31~~ 18, 7, 8, 19, 13, 16, 24, 22, 28, 19, 20, 24, 25, 26, 27, 28, 29, 30
~~May 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31~~ 3, 8, 9, 15, 11, 16, 22, 13, 22, 4, 23, 7, 31, 18, 19, 20, 24, 25, 26, 27, 28
~~June 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31~~ 3, 8, 9, 15, 11, 16, 22, 13, 22, 4, 23, 7, 18, 19, 20, 24, 25, 26, 27, 28, 29, 30

Percentage of Overnights Jan – June:

Mother: 112/180 = 62% Father: 68/180 = 38%

With this summary, she could explain how she kept the diary, noting down where the child spent each night and how she developed the summary based on the diary. She could offer the diary as an exhibit (under the recorded recollection rule of evidence that most courts follow) as well as the summary. John or his attorney could still question her about the diary and go day by day through it, but Jane's testimony and the ultimate point she is making would be crystal-clear and presented efficiently.

- Another example involves the same case, different issue: John is trying to prove that he has made all child support payments as required, with only occasional minor delays. He brings to court a cigar box bulging with cancelled checks and money orders and hands it to the judge. The judge hands it back, saying, "What do you expect me to do with these?"

John should have organized the checks, marked them as numbered exhibits, and prepared a written summary to be submitted along with the checks, along the following lines (see next page):

Support Due
Exhibit No.)
Week of

~~\$2300081)~~
~~\$13060082)~~
~~\$4000008~~
~~\$13050084)~~
~~\$13220085)~~
~~\$13290086)~~
~~\$5031008~~
~~\$23030088)~~
~~\$50.00~~
~~\$230200810)~~
~~\$230900811)~~
~~\$232000812)~~
~~\$2000008~~
~~\$330500814)~~
Etc, Etc, Etc.

The summary, along with the exhibits listed within, clearly show that John has paid support when he was supposed to, apart from an occasional delay of just a few days. It makes the point much more effectively than his boxful of papers and his own unsubstantiated testimony.

As these examples show, summaries of voluminous documents or information can make a point much more effectively than a drawn-out or disorganized presentation can. However, there is a danger to using summaries—any error in the summary will hurt... badly. At best, the summary will lose credibility. At worst, the judge will think you are trying to pull a fast one.

There was an error in Jane's overnight chart above, and if John spots it, he can take away much of the effectiveness of Jane's summary by pointing it out to her during cross-examination. Or perhaps better, he could point out the error to the court when Jane tries to offer the summary into evidence.

So, if you use a summary (and you should if the situation allows), make sure it is completely accurate. Check it, and check it again. If you discover a mistake after you have given it to the court or to the other party, write up a corrected version if you have time and ask to substitute it. If you don't have time to prepare a corrected version, point out the error before the other party has a chance to, and ask the judge to note the correction. If you wait to see if the other party catches the mistake, you risk having the judge question your accuracy...and even your integrity.

If you use a summary, bring any supporting information and documents with you to court in case anyone questions whether the summary is accurate. If the information is in your head, offer the summary and tell the judge how you prepared it, and why you believe the information contained in it is true.

Preparing Cross-Examination

Part of preparing for trial is anticipating what the other party is likely to present. The pretrial process often requires the parties to exchange lists of witnesses and exhibits before the trial. If the other party fails to meet a deadline for doing this, you can object to witnesses and exhibits being presented, and the court may well agree with you. (If you have also missed that deadline or any other major deadlines, you may want to keep quiet in case the court applies the same yardstick to you).

Assuming you have a good idea of whom the other party will call as witnesses and what they are likely to say, you may benefit by giving thought ahead of time to whether you plan to cross-examine them and, if so, what areas you might cover. Keep the following points in mind about cross-examination:

- **Avoid cross-examination if you can:** Even the most skilled of trial lawyers use caution in cross-examining opposing witnesses. Cross-examination usually does not help the questioner at all and often hurts, by giving an unfriendly witness the chance to repeat damaging testimony or even add to the damage. Only if you have a specific goal for asking questions should you cross-examine.
- **Don't ask a question that you don't know how the witness will answer:** Fishing for information on cross-examination is almost always a bad idea. The answer may make you wish you had never asked the question.
- **Don't forget to ask questions:** Another common sight in family court is the pro se party who starts questioning an opposing witness (who often may be the other party) but winds up making statements rather than asking questions. Remember, cross-examination is a time to ask questions, not a time to testify.
- **Don't work too hard trying to get an unfriendly witness to agree with you:** Another mistake pro se parties sometimes make is trying to get an opposing witness (who often is the opposing party) to agree when it is obvious there will never be agreement. You will do a much better

job of making your point through your own testimony instead of trying to get the other party or the other party's witnesses to agree with you. They don't and they won't—after all, you are in a contested court case. Skip pointless cross-examination and make the point you are trying to make in your own words through your own testimony.

- **Don't argue with the witness:** Every family court judge has seen a pro se party (and sometimes even a lawyer) start arguing with the witness instead of asking legitimate questions. For example, the question "Why are you lying to the judge?" is argumentative and is not a legitimate question.
- **Do cross-examine if it will definitely help you:** We are not saying, never under any circumstances cross-examine the other party or the other party's witnesses. There are times when it can be very helpful. If the witness has a close relationship with the other party that has not yet been brought out in the witness's testimony, the judge might well view that testimony differently if you bring out the close relationship between the witness and the other party. Try to limit your cross-examination to areas where you have an important point to bring out, and you can be sure of making the point you intend to. For example, if the other party has a criminal conviction for assaulting you or your child, and has not admitted it during testimony, and you have a court-certified copy of the conviction record, do ask the other party's character witnesses if they are aware of the conviction and of the sentence given to the other party.
- **Don't open cans of worms or wake sleeping dogs:** Pro se parties and even lawyers sometimes ask about things during cross-examination that were not brought up by an unfriendly witness during questioning by the other party. Sometimes the purpose in such questions is presumably to make it clear to the judge that the witness has nothing to say about the topic of the question. For example, the question might be, "During your testimony you didn't dispute that I have paid all child support when due, correct?" The risk in such a question is that the questioner will learn that the witness in fact has plenty to say, and none of it is good. The better approach is to leave the topic alone and to point out to the judge, after all the testimony is over, that the witness had nothing to say.

One Question Too Many

This happened to a lawyer representing a party claiming to be owed a lot of child support in a family case. The opposing party had testified on other contested issues, but had said nothing about the child support. So, the lawyer got up to cross-examine and said, "I notice

you haven't said anything about child support; I assume that means you agree you owe my client the amount she says you do." The other party snapped his fingers and said, "I knew I had forgotten something." He reached in his pocket and pulled out a small stack of papers, clipped together. "Here are the cancelled checks, money order receipts showing I paid everything. I was a little late some weeks, but the proof I paid is all here." Totally taken aback, the lawyer took a quick look at the papers and then asked the judge for an opportunity to review them with his client.

— A.M.H.

Anticipating the Other Party's Evidence

You need not only to prepare to make the points you have in mind, but also to prepare to respond to the other party's evidence. If you are the plaintiff, you will present your evidence first, and will have to wait until the defendant has finished presenting evidence before you will have the chance to respond. If you are the defendant in the case, when it is your turn to present evidence, you will be responding to the plaintiff's evidence while also making the points you wish to make.

The response of a plaintiff to a defendant's evidence is called *rebuttal evidence*. Because the defendant usually goes second in presenting evidence, the defendant automatically gets to respond to the plaintiff's evidence.

The plaintiff's right to present rebuttal evidence in response to the defendant is not unlimited. Rebuttal evidence responds to issues or allegations raised during the defendant's presentation of evidence. Rebuttal evidence is not evidence that merely repeats what the plaintiff has already presented, or that should have been presented when it was the plaintiff's turn to present evidence.

Be ready to respond to the other party's points. Be familiar with documents that you and the other party are submitting, in case you can refute the other party's evidence with a document.

Exchanging Witness and Exhibit Information Before the Hearing

One essential step before trial is to check the court's orders in your case and make sure you understand and follow all requirements and deadlines. Different courts and judges set the deadlines differently, but it is common for courts to require the parties in a family case to notify each other of what witnesses and documents each plans to present, no later than 10 or 20 days before the start of trial. Usually this means

that each party has to give the other a written list containing the names, addresses and telephone numbers of all witnesses the party plans to have testify, and another list of all documents the party plans to ask the court to consider as evidence.

Missing these deadlines might prevent you from presenting your witnesses and exhibits, so it is crucial that you put all deadlines in your calendar and abide by them. It is also essential that you read the court orders carefully, so you understand what the court expects you to do. If you have any questions, check with the court clerk.

Narrowing the Issues Before Hearing

Preparing for trial as we suggest will help you assess the strengths and weaknesses of your evidence. The other party may well be going through a similar process. It is not unusual for parties in family cases to narrow the contested issues before trial, by reaching agreement on some aspects of the case. It is often easier to resolve family cases if one or both parties have attorneys, so that the parties don't have to negotiate directly. But parties representing themselves can also talk before a family case trial and see if some or all of the areas of disagreement can be resolved.

That discussion will be productive only if the parties are able to communicate in a mutually appropriate and respectful manner. If you and the other party cannot have that kind of conversation, we don't suggest attempting to open negotiations directly with the other party. But if you can, there are several practical reasons why it makes sense to touch base with the other party (or the other party's attorney) before the day of trial:

- You may save yourself a trip to court. Settling a court case usually involves compromise by both parties. If you give something in one area, the other party is more likely to give on the same or another area of disagreement.
- You avoid the risk of going to trial, especially if you are likely to lose on a particular issue. A big benefit of settling outside court is that both parties know just where they stand, and both avoid the risk that the judge will disagree with one or both of them on a particular issue.
- The judge likely will want to know if you have tried to settle some or all of the disagreements. Before starting a trial, a family court judge will often check to see if the parties have tried to resolve the case without trial, and will encourage the parties and/or their lawyers to

explore settlement before the trial gets underway. The judge may even have suggestions or ideas for resolving disagreements. Your credibility with the court goes up if you are open to ideas and viewpoints other than your own. The “my way or the highway” attitude does not go over well at all with most judges, and it may affect the judge’s view of you on a variety of issues, including parenting.

Narrowing the issues may also enable you and the other party to reduce the number of witnesses and documents presented to the court, and thereby reduce the length of the trial.

Settling Some or All of Your Case before Trial

The saying goes that 9 out of 10 cases settle without going to trial. In our experience, a family case is more likely to settle if at least one party is represented by a lawyer. This may seem contrary to logic—you might think that having lawyers involved would reduce, not enhance, the likelihood of a case being settled by agreement without a trial. However, most lawyers would rather solve problems than create them, and most lawyers who have more than minimal family law experience know how to settle a case. Also, having at least one lawyer involved in a family case enables the parties to explore settlement without having to negotiate with each other directly, because the discussions are through the lawyer or lawyers.

When neither party to a family case has a lawyer, the case can be more difficult to settle, for several reasons:

- One or both parties have unreasonable or unrealistic expectations.
- The parties cannot negotiate effectively on their own.
- The parties do not know how to settle their case on their own.

When you and the other party come to court for your trial, the judge may well ask what efforts have been made to settle the case. Most courts require divorce and other family cases to go through mediation before coming to trial. Mediation often occurs early in the process, and if a case isn’t settled at mediation, many judges expect further efforts at settlement to be made as the case moves ahead.

If one or both parties have lawyers, the judge may be unhappy if the lawyers have made no effort to settle the case, and will tell the lawyers to go try to work on a settlement of at least some, preferably all, contested issues. If no lawyers are involved, the judge is likely to be more understanding, because it is difficult for pro se parties to

work things out on their own. However, the judge is still likely to encourage the parties to consider settlement, and may in fact ask questions designed to enable the judge to determine whether settlement is possible or not. Some judges will even make suggestions on how particular issues might be resolved, based on their experience with other cases involving similar issues. You don't have to go along with what the judge suggests, but you should give it thoughtful consideration.

If you and the other party do settle one or more, or even all, of the contested issues in your case, the terms of settlement must be documented. One way to document the terms of settlement is to write them down and have all parties review and sign the document. Another way is to place the terms "on the record" in the courtroom, meaning to have the parties or their lawyers tell the judge what the terms of settlement are, while the court reporter or electronic recording system is taking everything down. If you don't have a lawyer and are not sure what the terms of settlement mean, or have questions about the settlement, ask the judge. If you have a lawyer, ask your lawyer. The judge may tell you that he or she cannot give you legal advice or tell you whether or not to enter into the settlement. This is because the judge is neutral and on no one's side, and a judge cannot advise you in the way that your own lawyer could do, if you had one. On the other hand, most judges are willing to explain the meaning of legal terminology and to answer questions about the court process.

There is little harm in asking the judge whether the judge thinks the settlement agreement is fair. The judge may or may not be willing to answer that exact question. Some judges may view answering that question as the equivalent of giving legal advice; others may be willing to answer. You may be more likely to get an answer if you ask the judge whether the terms of settlement are in line with what the judge has observed in other cases involving similar issues. That question does not directly call for the judge to voice a subjective opinion about fairness, and rather invites the judge to compare the resolution of some or all issues in your case with the resolution of similar issues the judge has seen in other cases. Some judges may decline to answer that question also.

You can also ask the judge to make sure the settlement agreement covers everything that it needs to, in terms of resolving the issue or issues that have been agreed upon. Most judges will be willing to respond, at least by telling you if there is a gap or missing ingredient. It is in the court's interest to make sure that a settlement covers and

accomplishes what it is supposed to, because otherwise the parties are likely to be back in court.

How to Request, or Object to, a Postponement of the Hearing

So your trial is coming up and you haven't resolved all, or maybe even any, of the contested issues. You need to ask the court to postpone the trial. Or maybe you learn that the other party wants the court to postpone the trial. What do you do?

First, we will cover how you ask for a postponement.

More Court Terminology

In many if not most courts, the postponement of any court event is called a *continuance*, and a request to postpone is called a *motion to continue*. In other courts, a postponement is called an *adjournment*.

Here are some guidelines for requesting a postponement or continuance of a trial (or any other court event):

1. *Make your request as soon as possible.* The longer you delay in submitting a request to the court, the less likely (all other factors being equal) it will be granted. In particular, a request to postpone made on the day of trial, with the judge and the other party ready to go forward, is almost surely doomed, especially if you could have made the request sooner. If you are very ill, maybe the judge will agree to a postponement, but you may have to submit a doctor's note to confirm you are truly that sick.
2. *Put your request in writing, in the form of a motion to continue.* Calling the court clerk is not a good way to submit a request to postpone, for two reasons. First, your request may get lost in the "busyness" of the clerk's office. Second, the clerk will have to present your request to a judge, and may or may not pass along the reasons for your request completely and accurately. Making your request in writing helps ensure that the judge who will decide on your request is aware, directly from you, of your reasons for making it. If you don't have time to put your request in writing, then do use the telephone.
3. *Have a very good reason for asking to postpone your case.* Keep in mind that the family court also expects you to put a high priority on your case, meaning that the court will expect you to re-schedule other things if necessary, so you have time to come to court. Judges do understand that people have other obligations, and are often willing to accommodate a significant scheduling concern. Good reasons to continue include: you are ill and unable to prepare for and attend

court; you have made previous commitments for vacation or a family event; you have a very important medical appointment or procedure; you have a very important work-related reason; a very important witness for you cannot be at court on the day scheduled for trial; the other party has failed to provide you with essential information that the court has ordered be provided. There are, of course, other good reasons to postpone a trial but most requests to postpone fall in one of these categories.

4. *In making your request, describe any hardship you would suffer if your request to postpone trial is not granted.* If your trial has been scheduled to take place during a previously planned vacation, tell the court how much money you stand to lose in terms of travel or lodging costs if the postponement is not granted. If it is for a medical reason, be specific on why the appointment, surgery, etc. cannot be re-scheduled. If it is for employment reasons, tell the court what would or could happen if the postponement is denied. If it is because a witness cannot attend, describe what you expect the witness's testimony to cover, why the testimony is important, and why the witness cannot be at court on the scheduled day. Obviously, if there is no hardship, you may want to reconsider asking for the postponement.

5. *Check to see if the other party agrees or objects to your request.* A motion to continue that is agreed to by the other party has a greater chance of being granted than one that is opposed by the other party. If the other party agrees with your request, include that fact in your motion to continue. Lawyers sometimes even title such motions "Unopposed Motion to Continue" or something to that effect, to signal to the court immediately that the other party does not object.

6. *Follow up your request by telephone until you hear that the judge has acted on it.* Sometimes people (even lawyers) submit motions to continue and assume their request has been granted, and don't come to court. If the court has not granted the request, there could be very bad consequences if a party doesn't show up at court. Follow up your motion to continue by telephone, to make sure it is presented to a judge in a timely way.

Don't assume your request to postpone will be granted, especially if it is not the first such request you have made. Many judges are willing to give a party one continuance, even if the other party objects, but may balk at the second or third request. That means you should request a postponement only if you truly need it.

If the other party is requesting the postponement, you are free to

object or agree, but keep the following in mind:

- If the other party has a strong reason for requesting a postponement, the court is likely to agree to the postponement even if you object. This is especially true if this is the other party's first postponement request, and also if the other party's request is made promptly and for good reason, and not at the last minute and for no good reason.
- If the court has already granted a postponement at your request with the agreement of the other party, the other party has a right to expect you will not oppose the other party's request, except for a very good reason.
- If the other party has made multiple requests for postponement, or waits to the last minute to make the request, or is unable to give a good reason, your objection is more likely to be upheld.
- If you do plan to object to the postponement request, do it as soon as possible, because the court may take your silence to be consent to the request. Start by calling the clerk and stating the reasons for your objection, and following up the call in writing (with a copy to the other party, of course) if need be.

Keep Checking Your Trial Preparation Checklist

At the beginning of this chapter, we presented a trial preparation checklist, outlining the steps that commonly need to be taken to get ready for a trial. Be ready to adapt that checklist as the situation changes. The court deadlines may change; you may add or delete witnesses or exhibits in your case.

Varieties of Trial Scheduling: Know How Your Court Works

If you have a family case coming to trial, it is quite important for you to understand how your family court schedules cases for trial. This section explains the different ways courts around the country schedule cases for trial, in family cases as well as in other dockets.

- *A Table for Two, Please:* If you are lucky, your family court will give you a specific day and time for trial well in advance. You and your witnesses will know when and where you need to be, and what needs to be done beforehand. Courts that use this method of scheduling tend not to be too busy. They can afford to give the parties in their cases reservations, just as high-end restaurants give their dining patrons reservations for dinner at specific times. You know in advance when the court expects you, and you know your trial will begin at that time.

All you need to do is show up, although it is always good to check a few days ahead of time and make sure the court schedule has not changed.

- *Next in Line: The Trailing Docket:* If you are less lucky, your family court may give you a specific time frame—but not a date—during which your case may be called. The court may set aside a solid week or a solid month, and may have dozens of cases scheduled for trial during that time. As each trial finishes, a new one begins. The parties in a particular case know that the case likely will be called to trial at some point during that week or month, but may not learn the exact day and time until the day before. This method is often called “the trailing docket.” Courts that use this method tend to be busier. Trial time is too precious to go to waste if a case happens to settle without trial. Cases do settle without going to trial quite often, so courts have learned that giving each case a reservation can be wasteful. Instead, cases are lined up like airplanes waiting to take off from an airport. Each case is called in when the court is ready to start the trial. If a case settles, the case next in line gets called in, and the trial time is not wasted.

- *Standby Passengers:* A variation on this method involves the court scheduling several cases for trial at the same time. Sometimes one case is designated as the primary case, or first case in line for trial. Another case is the back-up case—it goes to trial only if the first case settles or is postponed.

The first scheduling method listed above is far and away the most user-friendly for parties and witnesses. You and the other party know exactly when your witnesses need to come to court. The second and third methods serve the convenience of the court, and can be quite inconvenient for parties and witnesses. If your case is scheduled during a given week or month, the court may expect you to be able to drop everything and come to court for trial on a day’s notice. If your case is one of several scheduled for the same time, you and your witnesses may wait around at court all day without your case being reached.

All you can really do to reduce inconvenience is to learn how your court works and adapt. For example, if you don’t have a reservation for trial, i.e. a specific day and time when your trial will definitely begin, tell your witnesses to be on standby and not to come to court until you telephone or text-message them. As soon as you do get a definite time and date, which you will eventually, get in touch with your witnesses. If your witnesses are not yet at court when the trial is

scheduled to begin, the judge may want to start the trial anyway, perhaps with you as the first witness, but your witnesses still can get to court in time to testify.

A Pitch for the Courts

Unfortunately, because many family courts are swamped with work and are grossly under-funded by their legislatures, delay and inconvenience are common. If you experience inconvenience in your family case, rather than taking your frustrations out on your court clerk or judge talk to your legislator or whoever decides on funding for the courts.

Coming to Court

Get to court a little early, or at least on time. Dress in a way that shows you take yourself and your case seriously—no beach attire; no nightclub attire. One lawyer recommends to his clients that they dress for court as if they were going to a wake or viewing—to show respect.

Bad Clothing Choices

Two courtroom attire stories from our criminal court experience: The defendant stood in front of me, having just pleaded guilty to a misdemeanor charge of resisting arrest. His coat was open, so I could read the slogan on his T-shirt: “I SHOT THE SHERIFF.” I did not say anything, but thought, “What was he thinking when he got dressed this morning?”

— A.M.H.

The defendant stood in front of me at his arraignment on a charge of drunk driving. When we got done, I looked at him and observed that when he came back for his actual trial, perhaps it would be best if he wore something else than his “Captain Morgan” hoodie. He looked at me in a puzzled way and said “Why is that?”

— J.D.K.

The Beginning of the Trial

The day of the trial has come—you and the other party are both present and ready to proceed. With guidance from the court officer or perhaps from prior experience in the courtroom, you know which of the tables facing the bench is for you. The judge comes in to the courtroom. What happens next?

Usually before actually convening the trial and taking testimony, the judge will have some preliminary questions for both parties, all of which you should be prepared to answer:

- *Contested issues:* Thanks to your preparation, you will be able to tell the judge what you are asking the court to do in terms of custody, child support, alimony, property and any other contested issues, and you will be able to respond to what the other party says.

- *Possibility of Settlement:* Again, thanks to your preparation, you will be able to tell the judge that you and the other party have—or have not—resolved some or all of the contested issues. If any are resolved, the judge will ask whether any written agreement has been signed yet, and if not, may ask for the terms of settlement to be presented, so that the judge can confirm there indeed is an agreement. Sometimes the judge will ask the parties if further settlement discussions might be productive. Many family law cases are settled on the day of trial, and even during trial. If you think further discussions might be productive, tell the judge. If the other party agrees, the judge may leave the courtroom to allow the discussion to happen. Keep in mind that whatever time is used to discuss settlement may be subtracted from the total time available for trial.

- *Length of Trial:* During the pretrial process, the parties and the court have developed an estimate of how long the trial will be. Some courts schedule judges and cases based on those estimates. Taking less time than estimated is never a problem, but taking much more time than estimated can be a serious problem. At the beginning of a trial, it is common for a judge to go over with the parties how long the trial will last, and how much time is allotted to each party. Without that discussion, the defendant in a family case may be pressed for time because the plaintiff's case has taken up more than half the total available time. If you are the defendant and therefore presenting evidence second, make sure at the outset that you are allocated your fair share of total time. Some judges keep rigorous track of how much time each party has used of their available time—remember the chess clock we mentioned in Chapter 8?

- *Sequestration of Witnesses:* It is not uncommon for trial judges to order witnesses “sequestered,” on request of either or both parties. Sequestration means that all witnesses except the parties must wait outside the courtroom until it is time to testify. The parties are exempt from sequestration, even if they are also witnesses. Obviously, the purpose of sequestration is to prevent a witness's testimony from being influenced by what the witness hears other witnesses say. Sequestration also means that a witness who has already testified cannot discuss the witness's testimony with any other witnesses who have yet to testify. Also, the parties are not allowed to tell their own witnesses what they or other witnesses have testified to. If neither

party asks for witnesses to be sequestered, the court often will not order it, but if either party requests it, the court usually grants the request.

- *Recording of Testimony:* One topic to be discussed before the trial begins is whether the witness testimony will be recorded in some way. Many courts have electronic recording equipment (digital or tape) and in others court reporters—also called court stenographers—take down the questions and answers as they are spoken. If you think you may want to appeal the court’s final decision, ask for your trial to be recorded. The reason is that a written word-for-word transcript of testimony at trial is often essential to the success of an appeal. Without a recording (either by equipment or a court reporter) there cannot be a transcript; and without a transcript, the appeals court is much less likely to question whether the evidence supported the family court judge’s rulings. On the other hand, if it is very unlikely you will be appealing the family court’s decision in your case, you probably don’t need the trial of your case to be recorded.

Some parties bring their own recording equipment to court with the intention of using it to record a trial or other court event. In most courts, this is not allowed, because there is too much potential for mischief and malfunction if parties make their own recording. Most courts take the position that, if there is going to be any recording at all, it will be done by court staff.

In some courts, the rules require parties to submit a written request for the trial to be recorded well before the day of trial. If you want a recording, make sure you submit your request within the deadline.

- *Witnesses and Other Scheduling Issues:* If you or the other party has witnesses who can only testify at specific times, working out an accommodation for all such witnesses and telling the judge at the outset is always a good idea. Judges encourage parties to accommodate each other’s witnesses in scheduling. For example, if a witness for the defendant is only available early in the day, during what would be the plaintiff’s turn to present evidence, the plaintiff likely would agree to suspend the presentation of evidence and allow the defendant’s witness to testify, on the understanding the plaintiff’s evidence resumes after that witness has finished testifying.

- *Opening Statement:* The judge may invite you and the other party to present opening statements before the testimony is taken. If the other party has a lawyer, the lawyer may ask the judge for permission to present an opening statement. An opening statement is simply a

party's summary of the case from the party's perspective. You don't have to give an opening statement, but a brief opening can help the judge understand your case before it unfolds in testimony. A good opening concisely identifies the issues as well as the major witnesses and documents that will be presented, and explains how those witnesses and documents support the party's claims in the case. It also tells the court what the party is asking the court to do.

Sample Opening Statement

"Your Honor, the major issues in this case are custody and child support. I am asking the court to award me custody of both children during the school week and some weekends. I do not agree with the defendant's request to divide time equally because that would mean they would be transitioning during the school week, and that would be detrimental to their progress in school. Both children have struggled in school. I have been the parent most involved in schoolwork, as well as medical appointments and generally meeting their needs. I am calling my mother and the defendant's mother as witnesses. Both will testify about my primary role in the children's upbringing and the children's need for my guidance, and they both support my request for custody. I do support the defendant having time with the children on weekends, during some school vacations and during summer vacation, but again, I believe they need to be with me for their own benefit during the school week throughout the school year.

The other issue is child support. I will be submitting our joint and separate tax returns for the past few years to show our earnings history. I am employed full-time in the same job I have had for twelve years. My earnings increase by the cost of living and I expect they will continue to do so. The defendant claims to be earning less than half of what he did the year before last, and significantly less than he did over the entire time of the marriage. He is not working full-time and I believe is deliberately under-employed so as to minimize his income. His mother, one of my witnesses, will testify to her knowledge that he is able to work full-time, able to earn what he did before, and has had at least one offer of a job that would have paid that amount. So I am asking the court to compute child support based on what I am earning and on what he could be earning. Thank you, Your Honor."

How to Present Your Own Testimony

An earlier chapter discusses courtroom etiquette, and you should re-read it a few days before the trial. [\[28\]](#)

Here are our suggestions for presenting your own testimony.

When the judge invites you to present testimony, you might ask the judge if you should go to the witness stand or remain at the table with your papers. Many judges will allow a pro se party in a family case to testify from the table where the party sits, rather than taking the witness stand, to allow the party to retrieve and discuss documents in the course of testimony. Witnesses other than the parties must testify from the witness stand.

In a few family courts, pro se parties must ask themselves questions and then answer them, just as if there were a lawyer asking the questions. In most courts, pro se witnesses who testify are allowed to say what they have to say. Make sure you know in advance what your court permits. Also, keep in mind that the rules of evidence still apply, and if the other party objects, you must stop talking until the judge tells you whether or not to continue with what you were saying.

Your Outline

Earlier in this chapter, we explained how to write an outline of your own testimony. If you haven't done that yet, go back and read that section, write an outline, and then come back here.

When you are testifying, bring your outline with you to the witness stand so you can refer to it while testifying. Remember that the other party is entitled to look at any document that you bring with you to the witness stand, so don't put anything in your outline of testimony that you would not want the other party to read. There is no harm in listing the topics you plan to discuss in your testimony—the other party will learn what they are anyway, as you testify.

If you bring an outline with you to testify, the other party may object to your referring to it while testifying, especially if it contains specific details about contested issues. The judge may tell you to put it aside while testifying. However, you do have a right to refer to it if you need to do so in order to remember the points you plan to cover. If you can't exactly recall what you planned to cover in your testimony, tell the judge you can't remember all of the points you wanted to cover, and ask if you can refer to your outline to remind yourself of your points and make sure you haven't left out anything.

“Good morning, how am I?” “I’m fine, thank me, and me?”

A few courts require pro se parties who testify on their own behalf to ask themselves questions and then answer them. This may seem a little ridiculous, but there is a reason for it: to give the opposing party the opportunity to object to information before it is actually

presented. When a case is being heard by a jury, the requirement makes a lot more sense than it does when the case is being presented to a judge. In most family courts, there is no jury and most judges will allow pro se parties to testify in what is called narrative fashion, meaning the parties simply speak about what they wish to cover as if presenting a story or narrative. If the party presents information that should not be considered, the judge will not consider it. Check with the clerk to see what your family court expects, and be prepared. If your court is one of the few that requires pro se parties to testify in a question-and-answer format, you may want to outline or even write out your questions to yourself ahead of time.

How to Present the Testimony of Your Witnesses

If you have other witnesses, you must be prepared to present their testimony in a question and answer format. Some judges will allow witnesses to say what they have to say without being asked detailed questions, but you can't count on that.

Earlier in this chapter, we explained about writing outlines for the testimony of witnesses. Before the trial, you should at least make a list of the points you will be asking the witness to address in testimony. If you anticipate any trouble thinking on your feet and coming up with questions based on your list, write out the questions. If time permits, and your witness is willing, meet with the witness ahead of trial and go over the questions you intend to ask, so the witness has a chance to think about how to answer them. If there are specific points you want to make sure the witness covers, you might write them in as well, so that you can ask a follow-up question if the witness doesn't mention the specific point in answering your question.

If you do use a list or outline when questioning witnesses, don't rely so heavily on the outline or list of questions that you forget to listen to the witness's answers.

Remember that most courts do not allow a party (or the lawyer for a party) to ask leading questions to the party's own witnesses, so make sure your questions to your own witnesses are open-ended. If the witness doesn't understand the question or give the answer you expect, reword the question so the witness understands what you are getting at.

A Picture is Worth A Thousand Words

One of the skillful family lawyers we know starts his client's testimony by asking his client to identify a picture of the client's child

or children and asking that it be accepted into evidence. Then he asks the client to tell the judge about the child.

This is a very effective way of helping the judge focus on the children as individuals rather than as abstractions. In presenting your case, think of ways to make the people and places interesting to the judge.

As with your own testimony, organize your questions to a witness in a logical way. Most lawyers start by asking the witness to state their name and where they reside, and to explain what connection they have to the parties in the case. Then a question directs the witness's attention to a particular topic, date or event.

One important point to remember is that your witness likely will not be allowed to testify to much of anything unless the witness has first-hand knowledge of it. The hearsay rule generally prohibits witnesses from repeating what others have told them.

So, for example, before you ask your witness whether the witness believes you are a good parent to your child, you need to show that the witness has first-hand knowledge of your parenting, whether it is being with the child, or showing a commitment to meeting the child's needs (educational, medical, etc). If a witness has not been shown to have first-hand knowledge of the area covered in a question, the lawyer for the other party may object for "lack of foundation," which is legalese for "it hasn't been shown that the witness has first-hand information with which to answer the question."

One major exception to the hearsay rule is that a witness for one party (including the party) is allowed to testify as to what they have heard or seen the *other* party say or do. Anything a party says or does can be used against them at a trial as an *admission*.

How to Present Your Exhibits

An exhibit is any object that is offered or accepted into evidence. Most exhibits are documents, such as tax returns, photographs or letters. However, anything can be an exhibit. In family cases, video or audio recordings on tape or disk are sometimes offered as exhibits.

Unlike testimony, an exhibit does not automatically become part of the evidence just because it is shown to a witness or a witness discusses it. When a witness—whether or not a party to the case—testifies, what the witness says automatically becomes part of the evidence, unless the court decides to "strike" the witness's statement, meaning exclude it as evidence. With exhibits, it is necessary to make

a specific motion (meaning a specific request) for the exhibit to be admitted into evidence.

There are three steps to getting an exhibit into evidence:

- The first step in dealing with an exhibit is to have it *marked* as an exhibit, meaning labeled as an exhibit. Usually the court will have “exhibit stickers” that are used to mark exhibits. You probably can get these in the courtroom. Each exhibit of a party is assigned a number or, less often a letter, and is referred to by that number or letter. For example, the plaintiff’s first exhibit would be referred to as “Plaintiff’s Exhibit 1.”

It may not be necessary to put an exhibit sticker on every document you mention in your testimony or on every document you show to a witness. Sometimes you may not need to have the document itself put into the evidence—you are showing it only to refresh a witness’s memory. Any exhibit you do want the court to consider as part of the evidence needs to be marked with an exhibit sticker.

- The second step is to identify it. To get any exhibit into evidence, you need to identify it in your own testimony or if you are showing it to a witness, have your witness identify it. Identifying it means simply to say what it is. That can be as easy as handing the document to your witness and asking, “What is this?” “This is the letter I received last May from Mr. Smith.” If it is an exhibit you are discussing in your own testimony you might say, “My exhibit 1 is the letter I received last May from Mr. Smith.”

- The third step is to *offer* it, or *move it* into evidence. An offer or motion is just a request for the court to accept the exhibit into the evidence that the court will consider in deciding the case. The words you might use are, “I offer my exhibit 1 into evidence” or “I move to admit plaintiff’s exhibit 1 into evidence.” Note that you refer to the assigned exhibit number in making your request.

Remember that the rules of evidence—the hearsayrule, for instance—apply to exhibits just as they do to witness testimony. Also, in some courts, original documents rather than photocopies must be used.

It is quite common for pro se parties, and even lawyers, to forget to *offer* or *move* their exhibits into the evidence that the court will consider. Before you finish presenting your case, make sure you have covered this step as to any exhibits you want the court to accept as evidence.

How to Object to Testimony

Judges usually have to consider evidence if there is no objection made by the other party. This doesn't mean the judge has to rely on it or believe it, only that the judge has to take it into account and cannot refuse to consider it at all. If there is an objection, the judge cannot consider the evidence if the objection is valid.

When one party in a family case is pro se and the other has a lawyer, these ground rules can often feel unfair to the pro se party. For instance, if the other party's lawyer objects to the pro se party's evidence, the judge must uphold the objections, if they are valid, and will not consider the evidence. On the other hand, if the pro se party does not object to the other party's evidence, the judge will have to consider it, even if it would have been rejected if the pro se party had made an objection.

This means that, to keep the playing field reasonably level, pro se parties should have some idea of how to object to evidence as well as how to present it. Here are some guidelines:

How to Object

- When objecting, say, "Objection" or "I object." Otherwise the judge may think you are simply interrupting to talk.
- When objecting, it also is good to give a reason, in a few words, to make it clear why you are objecting. Our suggestions for how to state specific objections in a few words are listed below.

When to Object and When Not to Object

- *Be selective in your objections.* Judges can get impatient with parties (and lawyers) who make a lot of objections, even valid objections, on unimportant or uncontested points. For instance, it isn't uncommon in divorce trials for one party's lawyer to ask the party leading questions at the very beginning of the party's testimony to cover uncontested background details, such as the date of marriage; the names and ages of children; the party's educational background; the places where the parties lived during the marriage, and so on. These details are usually necessary for the judge to know, and they can often be covered much faster through leading questions than open-ended questions. Objections to leading questions to a party's own witness are valid, but if the questions relate to uncontested background details like the

names and ages of children, they are also pointless and may even be annoying to the judge.

Objection: Blah, Blah, Blah, Blah, Blah, Blah

If the judge wants to know more about why you are objecting, the judge will ask. Long-winded objections are known in court as “speaking objections” and most judges dislike them, especially if a jury is present. On the other hand, most judges appreciate being told, again in a word or a few words, the reason for the objection.

Thus, if the other party (or lawyer) has asked a leading question to the party’s own witness say, “Objection: leading.” Don’t say, “Objection: the witness is being asked a question in a way that suggests the answer, and I think that is totally inappropriate and I want it stopped now.”

- *Objections can be made to questions or answers.*
- *When not to object to an answer.* The fact that you don’t agree with the other party’s evidence is not a reason to object to it. After all, you are having a trial, so the judge is not going to assume you agree with the other party’s evidence on a contested issue.
- *When not to object to a question or answer.* If a question or an answer relates to an uncontested point, it often isn’t worth objecting to. The purpose may be just to move the hearing along.
- *When to object to leading questions.* Leading questions to one’s own witness are usually not allowed, especially on important contested points. So if the other party’s lawyer asks the other party, “Your spouse is an abusive, irresponsible person, isn’t she (or he)?” you should say “Objection—leading.” If the leading question is on an unimportant or uncontested point—“You and your spouse have two children, correct?”—you technically can object but the lawyer is obviously just trying to move the testimony along, so don’t bother.
- *When to object to a question or answer for lack of foundation.* Lack of foundation means that a witness doesn’t have a basis in knowledge, training or experience on which to testify. If the other party asks a witness to recount a conversation that the witness did not participate in, or if a witness with no medical training starts to make a complicated medical diagnosis, you should say, “Objection—lack of foundation.”
- *When to object on hearsay grounds.* The rules of evidence generally prohibit hearsay evidence from being presented. There are exceptions

and exclusions—a major exclusion, for example, is that anything that a party says or writes is considered not hearsay and can be considered, if the statement or writing is used against that party by the other party. Also, a statement that is not being presented to prove that the statement is true is not hearsay.

For example, the statement, “John said the traffic light was red,” is likely hearsay if the point of the statement is to prove that the traffic light is red. However, if the point is to prove that John can talk, or that John can see, it likely is not hearsay. If you believe the other party is presenting hearsay evidence on a contested point, say, “Objection—hearsay.” [29]

- *When to object on relevance grounds.* If a question or an answer has nothing to do with any contested issue in the case, you may say, “Objection—relevance.” Judges tend to have some tolerance for irrelevant questions and answers if there might be some connection between the subject of the question or answer and a contested issue. But if there is truly no possible connection, or if there has been lengthy questioning (or answering) on an irrelevant topic, then even a tolerant judge will likely uphold the objection and tell the other party to move on.
- *When to object to repetitive testimony.* There are two kinds of repetitive testimony that come up in family cases. One kind is when a witness is asked the same question two or more times, or else gives the same testimony two or more times. The other is when the same areas are covered by two or more different witnesses. Parties need only one witness to prove a particular point, and that witness can be the party himself or herself. The legal term for repetitive testimony is that it is “cumulative.” You don’t necessarily have to use that word in objecting to repetitive questions or answers. Instead, say, “Objection: This has already been covered.” Or say, “Objection: This is repeating a previous question or answer.”

How to Object to a Document

The rules for objecting to documents are similar to those for objecting to questions or answers. Say the word or words, “Objection” or “I object,” and give a one or two word explanation: “Objection: hearsay” and “Objection: irrelevant.”

The major reasons for objecting to documents are:

- *Hearsay:* If the document is being offered to prove something is true,

it may be hearsay. Remember the hearsay rule does not apply to statements of a party that the other party is using as evidence, so you can submit letters, e-mails, etc. to you from the other party without violating the hearsay rule. The way to object: “Objection: hearsay.”

- *Lack of foundation*: If no one has identified what the document is, it may be excluded from the evidence for that reason. For example, if a handwritten letter is presented as being written by someone and no one has identified the handwriting, there is a lack of foundation (or basis) on which the court could attribute the letter to any particular writer. The way to object: “Objection: lack of foundation.”

- *Relevance*: If the document has no bearing on any issue in the case, it is not relevant and should not be considered. The way to object: “Objection: relevance.”

- *Lack of notice*: Many family courts require that, at a specified number of days before trial, each party must provide the other with a copy of any document to be presented as evidence at trial. If a party does not meet that requirement and the other party objects, the judge may refuse to accept the document. If the court has issued that type of order and the other party did not notify you it planned to present a document, you can object to the document on that basis. (If you did not comply with the same order as to any of your documents, you may want to think twice about objecting). The way to object: “Objection: I was not notified of this exhibit as required.”

- *Discovery violation*: A related reason to object is that the other party should have provided you with the document during the exchange of information usually known as discovery. The other party must have been obliged to turn over the document (or at least documents of that kind) during the discovery process for this to be a valid objection. You may not want to object if you already had or received the document at some point before the day of trial. The way to object: “Objection: this document was requested during discovery and was not provided.”

How to Make Sure the Ground Rules Apply Fairly

One common problem is that the parties during a trial come to court with different assumptions about how strictly the court rules—particularly the rules of evidence regarding leading questions and hearsay—are applied. There are steps you can take to clarify the ground rules and make sure they are applied fairly.

Here is an example of the problem:

Sometimes a party assumes that the court and the other party don't plan to enforce the rules strictly. Based on that assumption, the party lets the other party ask leading questions, present hearsay testimony and present witnesses and documents without any advance notice as required by the pretrial order, without raising any objection, even though an objection likely would have been upheld. Then, when the first party's turn to present evidence comes, the other party raises all kinds of objections leading questions, hearsay testimony or documents that weren't listed as exhibits as required. When the first party says, "It isn't fair, judge. You let them get away without following the rules and now you are enforcing them strictly against me," the judge replies, "But you never objected. I was waiting for you to object, and if you had I would have sustained it, but you let the other party get all of their evidence in without saying a word. If you thought there was an agreement between you and the other party to let both of you present evidence without objection, that should have been clarified up front."

Here is how to avoid being caught in that situation: When the other party starts presenting evidence in a way that the rules would not allow, say something like the following:

"Your Honor, to enable this trial to go smoothly and quickly, I plan to allow the other party to present leading questions, hearsay evidence, and witnesses and exhibits that were not listed ahead of time, without objecting, at least within reason, as long as the other party will not object when I do the same. Is the other party willing to make that agreement, and will the court accept it?"

How to Present Rebuttal Evidence

If you are the plaintiff and have presented evidence first, you may be allowed to present rebuttal evidence after the defendant has presented all of that party's evidence. The purpose of rebuttal evidence is to give the party that presented evidence first the chance to respond to new information presented by the other party. It is not an opportunity to rehash evidence that has already been presented.

An example of the difference:

- One of the issues in your case is who gets the car. As the plaintiff, you present a title and registration showing the car is listed in your name only. You testify that the other party has already agreed you should have the car. The defendant then testifies and admits the car is listed in your name, but denies making that agreement. There is

nothing for you to respond to with rebuttal evidence, because all you would be saying is, “Yes, there was too an agreement.” You have already said that and don’t need to say it again.

- Same situation, except that the defendant denies making the agreement and presents a note in your handwriting that reads, “I am letting you have the car.” You did write those words on that piece of paper, but it was three years ago, and it was a different car—one that you did give the defendant and that was later totaled. Because the defendant has presented new information—the document—you should be allowed to respond with rebuttal evidence—your testimony that the document does not relate to the car at issue in your case.

To present rebuttal evidence, when the other party has told the court that they have no more evidence to present, ask the court to present rebuttal evidence. The judge may well ask you what points you plan to respond to, and what your evidence consists of, so that the judge can decide whether your evidence is true rebuttal evidence. Be prepared to explain what you plan to cover.

How to Present a Summary (Closing Argument) at the End of Your Case

At the very end of a trial, after all witnesses and exhibits have been presented, judges sometimes ask the parties (or their lawyers) whether they wish to summarize their positions. This is an opportunity for you to tell the judge why you deserve to be granted what you are asking for. Here are some pointers for how to do it:

- Organize your presentation by issues. Take one at a time.
- Start by briefly summarizing the highlights of your evidence and the other party’s evidence on that issue. Explain why your evidence is more persuasive. State exactly what you are asking the court to do on that issue, and ask the court to grant your request.
- At the end, thank the judge for the time and attention the court has given to your case.

A Sample Summation

“Your Honor, there are two issues before the court: First, the amount of back child support I am owed, and second, whether there should be any change in the custody arrangement.

On back child support, the child support order shows what is to be paid. I testified about keeping careful records, and I presented a complete record of all payments made and not made. I showed

exactly what is due. I also showed the court what the other party is earning and has earned in terms of pay stubs and tax returns. He is fully capable of paying what is due on time. The other party claimed to have made payments, but did not present any canceled checks or money orders or receipts or anything else showing that he paid what he had claimed to. The evidence is clear: I am asking the court to decide I am owed \$2,344 in back child support. I am asking the court to order the other party to pay that arrearage within four months. His pay stubs prove he could afford to make that payment. I am also asking the court to order him to make all future payments by check, so there is a record of what is and isn't paid.

As to custody, I showed that our daughter is doing very well living with me; she is doing well in school, is involved in sports and other activities, and has friends in the neighborhood. She is happy with the present arrangement—she gets to have dinner with her father one night every week and stays with him every other weekend. The other party is trying to change an arrangement that is working well. His evidence did not demonstrate any need for a change, or really any reason for a change. I believe it is no coincidence that custody and child support issues are coming up together. He wants to change custody to reduce or eliminate his child support, which he has never paid willingly. I ask the court to see this for the ploy that it is, and to deny his request, and leave custody and visitation as they are.

Your Honor, I appreciate the time and attention the court has given to my evidence. Thank you.”

The trial is over. You and the other party leave the courthouse and go back to daily living.

Timing of the Judge's Decision

At the very end of a trial, it is not unusual for the judge to announce the decision in a simple case by speaking about it right there in the courtroom. This practice is called “ruling from the bench,” and many judges rule from the bench when the case allows. If the case is complicated or involves voluminous exhibits, ruling from the bench is not practical or even possible, and the judge's decision will be issued on a later day, in writing. This is called “taking the case under advisement.”[\[30\]](#)

Your Poor Planning Does Not Constitute My Emergency

Sometimes parties in family court delay coming to court and then face urgent deadlines that mean they need the court to act immediately. For instance, divorcing parents who disagree over where a child should attend school need to start their court case well before the

start of the school year so the court has time to process the case and come to a decision. Judges do not like to be put in the position of rushing to a decision because the parties haven't planned ahead. The lesson for family case parties is to give the court process the time it needs. If your family courts are backed up with cases, don't expect your case to jump ahead in line. Everyone waiting ahead of you has their own pressures and deadlines.

If you face a deadline like that—calling for an important decision that you cannot make until you have the judge's decision—tell the judge before you leave the courtroom. Many judges are willing to try to expedite their decisions if they know the parties have an urgent and legitimate need for a speedy decision.

Post-Trial Briefs and Proposed Orders

It's quite common for lawyers in family cases to give the judge what are called proposed orders, meaning draft court orders that set forth the decision that the lawyer's client is asking the judge to make. These can be quite helpful to judges in several ways. A proposed order provides a roadmap to the party's position on the issues in the case. If the judge agrees with the order, it can furnish wording that the judge can use in the court decision.

Some lawyers bring proposed orders with them to trial and give them to the judge. Sometimes lawyers submit proposed orders to the judge after the trial. At other times, a judge asks the attorneys in the case to draft and submit proposed orders after trial, particularly if the judge has announced the decision in the courtroom.

Lawyers also often submit briefs to the court. Briefs are not draft orders; instead they usually present legal arguments to the court. Briefs can be submitted before trial, at trial or after trial. To submit a brief after the trial, a lawyer must usually ask the judge's permission to do so, while the judge is still in the courtroom.

Judges don't expect briefs or proposed orders from pro se parties. But if there is a lawyer on the other side, the judge may ask the lawyer to submit a proposed order, especially if the judge announced the decision in the case while still in the courtroom. Chapter 12 covers that process in detail.

If the lawyer for the other party does submit a brief, you have a right to respond, in writing. If the lawyer for the other party does submit a proposed order, you have a right to comment on the proposed order. If you are still at court when you receive the brief or proposed order,

you can comment right then. If you get the brief or proposed order in the mail after the trial, you will have to send any comment to the court in writing.

Chapter 12

After a Court Hearing

The Endgame: From Trial to Appeal

“It’s not so important who starts the game but who finishes it.”

— John Wooden,

Head Basketball Coach, UCLA (1948-75)

T

his chapter covers the last stages of a court case. The trial, if there was one, is over. The court renders its decision, either one delivered orally in the courtroom or one delivered in writing after the trial, sometimes long after the trial.

A family case can go in any of several directions at this point. Sometimes one or both parties decide to appeal the court’s decision. Sometimes one party or both want to present more evidence and re-open the case. Sometimes the court’s decision contains an obvious error and needs to be fixed.

Decisions, Orders, Judgments, Decrees

This chapter uses the catch-all term “decision” to refer to what the judge issues at the end of a case. In fact, the document may have another name. It may be called an order, a judgment, a decree or some other name. In law, each of these designations has a slightly different meaning:

- An order refers to any court directive issued during a court case.
- A judgment refers to any final decision of the court in a case. It can consist of a single sentence—Case dismissed. Judgment for Defendant.—or it may be lengthy.
- A decree is a judgment that is more than a single sentence and contains actual decisions and orders.

In the course of your family case, you may see multiple court orders, but you ordinarily will see only one judgment or decree, the one issued at the end of the case.

The specific topics covered in this chapter include what to do in the following situations:

- If the judge announces a decision while you are still in the courtroom,
- If the court is making its decision in writing after end of the trial,
- If the decision is delayed,
- If you need to correct or clarify the decision,
- If you need to present information or evidence after the hearing,
- If the other party tries to present information or evidence after the hearing,
- If the court requests or accepts further evidence,
- If you want to appeal the decision,
- If the other party appeals the decision.

A Time to Heal, a Time to Laugh, a Time to Weep...

“I thought the hardest time would be during the court battle,” the woman said. “Now that the court part has gone away, I’m finding this is the hard part—being back to dealing with him as usual.”

Once the family court has spoken, the people who brought their lives and their children’s lives into the courtroom and asked the judge to make everything right have to go back to where they were. They now have the decision of the court, and that may have changed some things, but it doesn’t change the people themselves.

After court, as you return to the activities and routines of your life, remember that you, your children and yes, the other party, may be injured or damaged, and you may need to recuperate and heal. Maybe you aren’t injured and don’t need healing—maybe you are happy with how everything worked out, and maybe the other party is, too. But many people who go through the family court process aren’t happy. Often, the reasons are financial: When one household becomes two separate households, people who were just getting by when they were living under the same roof probably aren’t going to make it, at least without what can be devastating adjustments in their standard of living. Unfortunately, it is quite common for both parties to emerge from family court bitter and hurt, and in bad shape financially and emotionally. If your case fits this pattern, take time to heal, and recognize the same need in the other party.

It may be easier to move on with your life from court if you and the other party never have to deal with each other again. If you don’t have children, if neither of you is making payments to the other (or

scheduled to make payments), maybe you both can just ride over the horizon in different directions.

If you have children, or if you are connected financially through court-ordered payments or the like, then you will have to deal with each other. At first, that may be hard, especially if you or the other party, or both of you, came away feeling wounded or bitter about the court process. But if you do have to deal with each other, the two of you have an opportunity. It is to elevate your future dealings with each other to a place different from where you were in the middle of family court. If two people decide their relationship is going to work—meaning that they succeed in continually showing each other the thoughtfulness and respect that good relationships are built upon—then it will work. But if either of them falls short, then both will revert to where they were before.

It's worth thinking about.

If the Judge Announces the Decision While You Were Still in the Courtroom

Judges render their decisions in two different ways. One way involves “ruling from the bench,” meaning that the judge announces the decision and explains the reasons for it while still in the courtroom with the parties. The other way involves issuing the decision in writing after the trial is over, for the court clerk to mail to the parties. Which method is used in a particular family court case is entirely up to the judge.

If the case involves no complicated legal issues requiring research and doesn't involve voluminous exhibits that the judge must take time to review, the judge may decide to rule from the bench. Sometimes judges rule from the bench because they want to accomplish more than just issuing the ruling—they want to lecture the parties, or commend the parties, or explain the ruling in a way that likely would not come across as clearly in a written court order.

Bench rulings vary greatly in their length. Some judges simply give the parties the bottom line decision, without explaining how the decision was derived. Others go into great detail in explaining the law, explaining the evidence, explaining how they made decisions on contested factual questions, explaining the ruling itself. Some judges add editorial comment about the parties' behavior or strategy.

If you and the other party have agreed on some aspects of the case, the judge will usually say that the decision includes all the agreed-on points, and the judge will usually focus on what is contested.

A bench ruling will always be followed up by a written decision, although that decision may be much shorter and will usually not restate what the judge said in the courtroom.

If the other party has a lawyer, the judge may ask the lawyer to draft and submit a proposed order that tracks the judge's decision. The lawyer should send you a copy when it is filed with the court clerk. We suggest asking the judge if you can review a draft of the lawyer's proposed order before it is filed with the court clerk. That way, you can contact the other party's lawyer with any objections or changes before the court sees it and you may be able to resolve differences before they get to the judge.

When they rule from the bench, some judges just leave without waiting for any response. Other judges, when both parties are pro se, ask the parties if they understand the ruling and if they have any questions. This is not an opportunity for either party to re-argue the case. It is an opportunity to clarify any part of the judge's ruling that isn't clear. Perhaps the judge left out part of an issue—both parties need to know what the ruling is on that point.

The way a lawyer for a party would clarify the question is to say: "Your Honor, did the court make a ruling on my client's request for visitation every Wednesday with the child?" The judge might answer, "Oh, yes, I meant to say that I am granting that request—every Wednesday from after school to 7:00 p.m." If you need a point clarified, ask. The judge may well appreciate the request.

But don't argue with the judge. Here is how a judge might respond when a party starts arguing about a bench ruling: "Both parties have had their say, and I've listened carefully to the evidence. Now it is my turn and I have made what I consider to be an appropriate ruling. One or both parties may disagree with it, and I respect your right to disagree. But I've made my decision; you are both free to appeal if you wish."

The best way to deal with a ruling from the bench is the way professional athletes respond to winning or losing—or at least used to respond before victory dances and temper tantrums took hold in some sports. They didn't gloat in victory or whine in defeat—they just packed up and left. Many experienced trial lawyers will shake hands with opposing counsel right after a jury verdict—and it may be difficult to tell which of them won the case. We don't recommend trying to shake hands in the courtroom with the opposing party—both of you may be too keyed up emotionally for that. Win or lose, just

gather up your belongings and leave.

On Your Way Out of Court

If the judge needs to research the law or study exhibits, or even just needs time to reflect on the evidence, the judge may decide to issue the decision later in writing. Yet another reason why a judge might hold off announcing a decision is if the judge thinks the level of tension or hostility in the courtroom is so high that a ruling from the bench might cause an altercation, if not in the courtroom, elsewhere in the courthouse or in the parking lot.

Court security officers (also known as bailiffs) are used to seeing parties and their supporters get very upset in the courtroom after the judge leaves. Arguments and even physical altercations happen in the courthouse hallway or stairwell or elevator or parking lot. Sometimes, it isn't the parties who get into the arguments but the supporters. So if your boyfriend, mother, father, girlfriend or just friend has come with you to court to support you, make sure those people keep their cool and don't start (or respond to) anything. If the court security officers have to get involved, the judges will often hear about it.

Riches to Rags

When she testified at the trial of her contested divorce, the woman marveled: "Last year, my husband and I and our kids lived in a big house by the ocean. This year, the kids and I live in an apartment I can barely afford, and I had to apply for food stamps last winter." Her now ex-husband was back living with his parents, underemployed and struggling to pay child support. The successful business they had developed together had disintegrated under the stress of their divorce. Both had to start over. An extreme but true example of what divorce can do.

— A.M.H.

If the Judge Makes the Decision in Writing After End of the Trial

It is common for judges not to announce the decision to the parties in the courtroom, but to issue a written decision later. This practice is called "taking a case under advisement."

If the case presents any legal issues that the judge needs to research, or involves a large number of exhibits that the judge needs to review, the judge may feel compelled to take the case under advisement at least until completing those tasks. If your case does not involve complicated legal issues or many documents, the fact that the judge

takes the case under advisement may mean that the judge simply needs to reflect on the evidence and think through the decision.

Make sure the court clerk has your correct mailing address, because otherwise you may not hear of the court's decision until after your deadline to appeal has gone by.

How Long Will it Take for the Judge to Issue a Decision?

How long you have to wait is entirely up to the judge, but our experience is that very simple cases are often decided within a few days or a week, and more complicated cases can take weeks and months.

Sometimes, while still in the courtroom, the judge will tell you and the other party when you can expect the decision.

Remember, the clock doesn't even start running on the judge's decision until after the judge has received everything the parties are submitting. So, if the lawyer for the other party wants to submit a brief after trial, and the judge says you can write a letter in response, the case can't be decided until the court has received everything. Only then does the clock start.

If your case involved a lot of exhibits, or if you or the other party is submitting briefs, the delay may be more than a few weeks or a month. It is not uncommon for parties to wait one or two months for a decision, even longer in difficult or unusual cases. If you need a decision sooner—because you need to know sooner than a month or two which school your child will be attending, for instance—tell the judge while you are still in the courtroom when you hope to have a decision. If the judge is not aware of any urgency to the decision, the decision may take longer to issue.

If the Decision is Delayed

When should you become concerned? Obviously if you have a major deadline—such as needing to know which school your child should be enrolled in—then you have reason to be concerned a couple of weeks before that deadline.

Otherwise, don't start to get concerned until at least a month or two has passed. Sometimes, if the judge is busy or the case is very complicated, family court decisions can take months to issue.

A three-month delay is not good, but it is explicable in several ways—

the judge may be exceptionally busy, or may be experiencing a personal or family illness or other obstacle to completing work.

Anything much longer—six months plus—almost always means something is wrong. The judge may be ill or otherwise unable to finish the decision. The decision may have gone astray in the mail to you, although that seems unlikely if the other party hasn't heard of any decision either. Another possibility is that, due to a mix-up in the court clerk's office, the decision was never mailed out to the parties. It's also quite possible that there has been another kind of mix-up: the judge has forgotten to render the decision.

Most family courts handle hundreds of cases a year at all stages of the court process, and mix-ups of all kinds do happen. To the parties, for whom this is the most important case in the world, a mix-up is unthinkable. If that's your view, get over it. Instead of stewing, do something.

The first step is to call the clerk and ask if the judge has rendered a decision in your case. There are two reasons for asking this question first. One has to do with the possibility of a mix-up in the mails or within the clerk's office. Another reason is that, once the clerk sees that the decision is way overdue, the clerk will remind the judge. Yet another reason is that, if the judge has been ill or unavailable, the clerk will presumably tell you.

Remember, clerks tend to be quite protective of their judges (which we judges try to show we appreciate by being protective of them, too), so during your inquiry try to avoid being critical of the judge. If you have an urgent need for the decision, explain it to the clerk. In all likelihood, you will not need to say anything more.

If nothing happens in the next two or three weeks, call again. In this call, ask the clerk if there is anything you can do to get a decision. If these efforts produce no result, you may wish to get in touch with the judge who supervises judges in your area, often called "Chief Judge" or a similar title. After that ...well, we hope it never gets anywhere near that point.

Lawyer Folklore: "He (Or She) Who Asks First, Loses"

One piece of lawyer folklore has it that no lawyer should ever be the one to ask the court about a long-delayed decision. Instead, the lawyer should try to get the lawyer for the other party to ask. The theory, evidently, is that if the judge gets wind of which party's lawyer was the one who asked about the delayed decision, the judge

will punish that party with a bad ruling. We don't think this is true, but we pass it along to you anyway. There may well be a few judges around who are so petty as to retaliate if questioned about a long-delayed decision, but we hope not. That kind of retaliation is a clear violation of judicial ethics and, if proved, should result in serious consequences to the judge.

More often, the file may have gotten re-filed in the clerk's office, or misfiled in the judge's chambers. While it is not usual, cases awaiting decision sometimes "fall between the cracks." The judges we know and respect would appreciate being reminded of an overdue decision.

When the Court's Decision Arrives

When the judge issues a written decision, it is given to the court clerk, who mails it (and in some courts, e-mails it) to the parties, or to their attorneys if there are attorneys. When the decision arrives, read it carefully. Remember, it is a court order that will control everything that you and the other party asked the court to decide—custody, visitation, child support, alimony, division of property—so study it very carefully.

If you and the other party agreed on some points, the judge's written decision should refer to those agreements as well as to the contested areas the judge is deciding.

After you have read through the decision, read through it again. During your first read-through, you will be processing everything, and you may miss errors or omissions. Your second read-through will help you catch anything the judge has wrongly written out or left out. Do judges really get things wrong and leave things out? Well, sure, that happens. We judges like to think it doesn't happen very often, and we try to make sure it never happens at all in our own cases, but we are human.

If you don't understand any part of the decision, give it to a good friend or trusted relative and ask that person how she or he interprets that part of the court decision. If they don't understand it either, you may need to ask the judge to clarify it. We cover that in a later section of this chapter.

One of the most important steps to take when you receive the court's written decision is to make a note of the date on the decision. The judge may have dated the decision on the last page, but there normally will also be a date stamp from the clerk's office that shows when the clerk's office received the decision from the judge and noted

in the court records for issuing to the parties. The stamped date controls future deadlines; although if there is no stamped date, use the judge's date on the last page.

The reason for noting the date is that various court deadlines run from the date the court issued the decision. The deadlines for appealing the decision, requesting reconsideration, and requesting a new trial are all computed based on when the decision was issued. To be sure of meeting any of these deadlines, you must keep track of the date of the decision. We cover these steps in sections later in the chapter.

Contact with the Other Party about the Decision

When a judge decides several contested issues, it is quite common for the judge to agree with one party's viewpoint on some issues, and with the other party's viewpoint on others. This can make it difficult for a party to decide who "won" the case. In other situations, it may be obvious which party the judge's decision favors more.

If you won the case, or if you are quite happy with the decision, we don't suggest broadcasting your reaction to the other party. As we suggested in the earlier section about rulings from the bench, gloating and victory dances have no place in the family court process. Anything of that kind will only make matters worse, and may lead to your case being appealed when it would not have been if you had stayed quiet.

If you lost the case or are very unhappy with the decision, we still suggest keeping your reaction to yourself. You gain nothing by venting. Focus instead on deciding what, if any, action to take. We discuss your options later in this chapter. If the other party asks you if you plan to appeal, there is no reason to answer with anything other than, "Haven't decided." If you do appeal, the other party will find out soon enough.

The conversation you definitely should have with the other party as soon as you can is to discuss any parts of the court's decision that are not obvious in their meaning, to see if both of you have the same understanding. Sometimes court decisions are worded unclearly, leaving room for different interpretations. If you and the other party have very different interpretations of any important part of the court's decision, it definitely needs to be clarified or corrected by the court, and usually there is a tight deadline for making that kind of request. Ten days or thirteen days from the date of the decision are typical deadlines, so any problem of this kind needs to be identified quickly.

If You Need to Correct or Clarify the Decision or Ask the Judge to Reconsider

It's common for one or both parties in a family case to ask the judge to correct, clarify or reconsider some or all of the decision. Don't bother asking for any correction, clarification or reconsideration unless it is important. If it is important, don't hesitate to ask.

Correction, clarification and reconsideration are three different concepts, and they need to be discussed separately. They may also be subject to different deadlines under the rules of your family court:

- *Correction:* If the court order contains an obvious error and it is also obvious that the error is unintentional, such as a typo indicating that child support is \$5000 a week instead of \$50 a week, it should be corrected. In most family courts, the rules say that a motion (meaning a request) to correct must be filed in order to correct a court decision. There may be a deadline involved. The clerk may be able to give you a form to use or you can write up your own motion. Or, in most courts, you can just write a letter to the clerk explaining what needs to be corrected and how it should be corrected, and ask the court to consider your letter as a motion. If the other party agrees to the correction, put that in your letter.
- *Clarification:* Clarification is needed when the meaning of the court decision is ambiguous and subject to differing interpretations. A clarification may be needed because of an error (such as if the court decision mistakenly grants each party custody of the children during the spring school vacation) or because it omits something (such as when the court grants visitation one evening a week without saying which evening or at what times) or because the wording isn't clear. The procedure for requesting clarification is similar to that for corrections. It requires a motion (which in many courts can just be a letter) explaining what is unclear and what needs to be done to make it clear. Your letter should indicate how you believe the clarifying language should read. Your motion or letter should also state whether the other party agrees to your request.
- *Reconsideration:* A party's request that a judge reconsider a decision is different from a request to correct an unintentional error or a request to clarify an unintentional ambiguity in a decision. When you ask for reconsideration, you are asking the judge to change a decision that the judge has presumably thought over and arrived at carefully. For that reason, reconsideration is not often granted. Some courts don't allow requests to reconsider at all; those that do usually attach

strict deadlines to such requests—such as ten days or fourteen days from the date of the decision in question.

Your request to reconsider is most likely to succeed if you can convince the judge that the decision is obviously contrary to a controlling court case or statute. A second best approach is convincing the judge that an important piece of evidence was overlooked in the decision, and if the evidence had been considered, the decision would have been different. Arguing that the judge should have accepted your evidence over the other party's evidence is an argument with a low percentage for success. Arguments that the judge's decision violates your constitutional rights, or that the judge's decision proves bias, or that the other party lied to the judge are also not likely to succeed.

In all cases, check the rules in your family court for deadlines and procedures for requesting correction, clarification or reconsideration, and follow the rules.

If You or the Other Party Wants To Present New Information or Evidence After the Hearing

Sometimes the situation changes significantly right after the trial of a family case, and the change should be taken into account in the court's decision.

For example, a week after the trial, one of the parties is unexpectedly laid off from his high-paying job. He knows the other party is asking the court to order him to pay significant child support based on his earnings, so he wants the court to know of the layoff as soon as possible, before it issues its decision. The situation does not justify a correction or clarification. Reconsideration is also not the right avenue, again because the evidence presented justifies significant child support. What the party really needs is to "reopen the record" to present further evidence, specifically evidence of the layoff.

Another example: After the trial, one party finds out that the other party misstated his income from employment, presumably to reduce his child support obligation to less than it should be. The court issued a decision based on the false information. The party who made the discovery wants the court to know of the misstatement and change the decision to take account of the correct information.

Note that both of these examples involve situations in which new information came up right after the trial. In the first scenario, no decision had been made yet. In the second case, the court had already

issued its decision, but the new information dated back to the time frame covered in the decision. In both cases, the court was being asked to change its decision (or the decision in progress).

These examples are different from the situation where something changes after the original decision—a party moves, or a child starts living with the other parent. In those cases, the court does not need to change its original decision, but only to *update* it to take account of recent developments. That process—updating a previous court order or decision to take account of recent events—is called modifying or altering a previous judgment or order.[\[31\]](#)

What to do depends on whether or not the court has already issued its decision in the case.

- *If the court has not yet issued its decision*, the party that wants to present the new information should as soon as possible submit a written motion (request) to re-open the evidence. Speed is important because it often is easier to influence a decision that hasn't been issued than one that has. That request should explain what the new information is, how it came to the party's attention, and why it could not have been presented earlier, with all the other evidence.

The phrase “re-open the record” derives from the notion that after all evidence in a case is presented, the “record” of evidence presented is closed. The court cannot make a final decision in the case until the record is closed. By the same token, once the record is closed and the court issues a final decision, the record cannot be re-opened, except with the court's permission.

Once the motion to re-open the record is submitted, the court likely will wait for the other party's response and then decide whether to allow the new information to be submitted. The court may also hold a hearing on the motion itself, to help the court decide. If the court denies the motion to re-open the record, it will issue the decision based on the originally submitted evidence, without considering the new information. If the court grants the motion, it will accept the new information and consider it in the decision, although it may end up not changing the decision. In some cases, the new information can be submitted without actual witness testimony, if the parties agree the new information is accurate. If there is a disagreement, then the court may have to hold another hearing with testimony.

- *If the court has already issued its decision*, the party that wants to present the new information should submit a motion to amend or to

vacate (meaning a request to change or set aside) the original decision. Whether the issued decision needs to be amended or vacated depends on the significance of the newly discovered information to the decision. If the information affects only part of the decision, then the decision may need only to be changed in part. If the newly discovered information goes to the entire basis of the decision, the entire decision may have to be set aside.

Your court's rules likely set deadlines for filing motions to re-open or to amend or vacate. The motion should explain the newly discovered information and how it relates to the decision. It also should explain how and when the information came to your attention, and why it could not have been presented earlier. Before deciding the motion, your court will likely wait for the other party's response, and then decide whether to amend or vacate the original decision. The court may or may not schedule a hearing on the motion.

If the Court Requests or Accepts Further Evidence

If the judge grants a motion to re-open the record or grants a motion to amend or vacate, all the court has done is agree to take a second look at the case and consider additional information beyond what was originally presented. The court's decision may or may not be different as a result of considering the new information.

Once a motion to re-open the record or to amend or vacate a previously issued decision is granted, the court will likely tell the parties what to expect in terms of the second look at the case. Most likely, there will be an order that defines the areas or issues on which additional evidence will be accepted. The court may also schedule a conference designed to enable the parties and the judge to discuss whether there will be more testimony and if so, how long it will take.

If You Want to Appeal the Decision

Anyone who is dissatisfied with the court's final decision in a family case has the right to appeal the decision to a higher court. Think long and hard before you appeal, because the statistics are not favorable, and an appeal can be an expensive, arduous process.

Most family court decisions that are appealed are upheld as a result of the appeal. There are two reasons for this.

- One reason is that the party pursuing the appeal—called the appellant—often fails to follow the rules for an appeal. Those rules are different from state to state, but they involve deadlines and

requirements that are difficult, especially for pro se parties, to understand and follow. Those requirements can also be quite expensive: quite apart from legal fees, there can be very large costs for photocopying briefs, exhibits and transcripts and for preparing transcripts. Many appeals flounder and fail because of the complexity and expense of the requirements.

- The other reason is that appeals courts generally do not second-guess the family court judges who hold the trials and issue the rulings, except when it comes to errors of law. Whether to accept particular testimony or exhibits; which witness to believe; whether to grant a request for postponement, all involve matters of judgment that the appeals courts are reluctant to overturn, unless the family court ruling is totally unreasonable or arbitrary. To use the legal terminology, for the family court judge's decision on what evidence to admit and what evidence to believe to be overturned on appeal, the appellant usually has to show an "abuse of discretion" by the family court judge.

The one area in which the appeals court will not hesitate to overturn the family court judge's decision has to do with errors of law. If the appellant shows that the family court judge made a mistake in interpreting or applying the law, and that the mistake made a difference in the trial court's ruling, then the appeal is likely to be successful.

Before embarking on an appeal, carefully weigh your chances of success against the time and expense involved in the appeal. Can you point to any clear errors of law, or will you have to convince the appeals court that the family court judge committed an abuse of discretion? Will you be saddled with sizeable costs for photocopying and transcript expenses, even apart from legal fees? Also, weigh the possibility that if you appeal, the other party may decide there is nothing to lose by appealing any rulings made in your favor. In our court, an appeal taken in response to an appeal by the other party is called a cross-appeal. If you lose your appeal, and the other party succeeds in its cross-appeal, you may wind up worse off than if you had never appealed.

Believe it or not, none of this is intended to discourage you from appealing. It is meant to help you make a realistic assessment of the likely benefit of an appeal versus the likely cost. Many appeals are successful, but most are not. To help you decide, the next section provides an overview of the appeals process in most state courts.

Overview of the Appeal Process

Every state's family court process is different, including the procedure for appeals. On the other hand, there are some characteristics that are common to all states. If you are considering an appeal, or if you have to respond to the other party's appeal, check the rules that apply in your state.

- *Automatic Right to Appeal or Not:* Although everyone has the right to pursue an appeal, not every state requires the appeals court to accept the appeal and review the family court decision. The United States Supreme Court, for example, accepts for review only a small percentage of the appeals filed. It refuses to review the rest. Check the court laws and rules of your state to determine whether the appeals court in your state must review your appeal, or can turn it down without review.

- *Final Judgment Rule:* As a general rule, only final decisions of the family court can be appealed. The family court may make rulings along the way, while the case is working its way to trial, and with very limited exceptions, most state court rules prohibit appeals from being taken before the family court has made its final decision. The reason is that, if people were allowed to appeal at every step of the way, no family case would ever get done or at least done quickly. Cases would be bouncing back and forth between the family court and the appeals court at every step of the way—an inefficient approach from every viewpoint. Before you consider an appeal, make sure that your appeal either is based on a final decision in your case or fits within an exception to the general rule. The exceptions are different from state to state.

- *Deadlines:* Every state's court system has strict deadlines for appealing from the decisions of the family court. The reason for the deadlines is obvious: people involved in family cases—children included—need closure, certainty and finality. They need to know where they stand in terms of the court orders in their cases. The deadlines for appealing from a family court decision vary from state to state, but they generally are measured in terms of days or a few weeks from the decision. Often the operative date on when the deadline starts to run is when the court clerk docket the decision, meaning when it is entered into the court's permanent record for the case and is mailed to the parties or the lawyers for the parties.

If you are considering an appeal, your first step should be to find out when the appeal is due.

- *First Steps for Appealing:* Your next step should be to make sure you

understand the procedure required to begin an appeal. It usually involves filing a paper, often called a notice of appeal, with a court. The notice serves to let the court system and the other party know that an appeal is taken. Failure to file this notice usually means the appeal cannot go forward. The rules are different from state to state on what the contents of the notice of appeal must be, which court it must be filed with, and of course, the deadline by which it must be filed. There often are fees charged for appeals, to be paid when the notice of appeal is filed.

- *Cross-Appeals:* Often when one party to a family case appeals a final ruling, the other party decides to appeal as well on issues the family court decided against that party. The other party's appeal—taken in response to the first party's appeal—is called a cross-appeal in many states. So if you had not planned to appeal, but the other party does, you should consider whether to file your own appeal. We deal in more detail with cross-appeals in the next section.

- *Schedule for the Appeal:* After an appeal (and, if applicable, a cross-appeal) has been filed, the appeals court will usually issue a schedule for the rest of the appeal. That schedule sets deadlines for filing the appropriate material and information from the family court, and also for filing briefs, which are written legal memoranda arguing each party's position on the issues and rulings being appealed.

- *Issues and Rulings on Appeal:* At some point early in the appeals process, the party who has started the appeal (and the other party if there is a cross-appeal) must list the issues and rulings that are the subject of the party's appeal. The family court's final decision is not necessarily the only ruling that can be appealed. Earlier rulings in the case can also be appealed, once there is a final judgment or order in the case.

One reason why the appealing party—who is often called the appellant—must identify the issues and rulings that are the subject of the appeal is so that the other party—often called the appellee—knows how to respond. Another reason is so that both parties can present the appeals court with the appropriate information. The information presented to the appeals court for review of the family court decision is called “the record on appeal.”

- *Preparing and Filing the Record on Appeal:* What can make appeals very expensive is the step of preparing the information and materials necessary for the appeals court to review the rulings of the family court that are under appeal (and, if applicable, under cross-appeal). If

there was a trial in the family court at which witness testimony was presented, the appeals court needs to be provided with that testimony, through a word-for-word transcript if the testimony was recorded or taken down by a court reporter. It is the appellant's job to arrange for a transcript to be prepared, and to pay for it. Usually transcripts are prepared by the court reporter who took down the testimony at trial, or by the office in the court system that deals with electronic recordings of trials.

In some courts, if there is no actual word-for-word record of the testimony at trial, the appellant can submit a written summary of the evidence in lieu of a transcript, but this is a very distant second-best. A transcript of the trial testimony enables the appeals court to see exactly what witnesses said in response to questions. If your appeal is based on the argument that the family court decision is not justified by the evidence, your chances of success drop greatly if there is no verbatim transcript of the testimony, because the appeals court will be reluctant to find, without some proof, there was not enough evidence to justify the family court's ruling. A transcript of testimony will confirm what your appeal has alleged.

Transcripts generally cost anywhere from \$2.00 per page up, and a transcript page may cover only a minute or two of testimony. The transcript for a long trial can cost hundreds or thousands of dollars. In criminal cases, the cost of trial transcripts for indigent defendants is borne by the court system, but in most states, parties in family cases and other civil cases are responsible for paying the cost of preparing the transcript, regardless of their ability to pay. This is part of what makes appeals so expensive.

If there was no recording of the trial—either electronically or by a court reporter—some state courts allow the appellant to provide the appeals court with a written summary of the evidence. A summary usually has to be agreed to between the parties in terms of accuracy and completeness. If there is a dispute about the accuracy of the appellant's summary of the evidence, the appeals court will usually not try to resolve it because, without a recording of some kind, there is no way to do so.

The other components of the record on appeal are the documents from the family court: the court's written orders and decisions; the court clerk's docket sheets listing the activity in the case; and the exhibits admitted into evidence at the trial. Usually the appeals court has rules on how many copies of all of these documents have to be made and provided to the appeals court and the other party. The photocopying

cost can be substantial.

- *Briefing the Appeal:* The next step in the appeals process usually involves the filing of legal briefs. Most appeals courts have rules that define the format of legal briefs, even down to the size of the type font used. Some courts set page limits on briefs. There also are requirements for how many copies of briefs have to be provided to the appeals court and the other party. If you don't know the rules, check them and see if your court library has any copies of recent briefs for you to review.

The appellant usually files a brief first, with the appellee's response due next. Usually the appellant is allowed to respond to new information raised in the appellee's brief, in the same way a plaintiff is allowed to present rebuttal evidence after the defendant's case has been presented.

The elements of a brief usually include: a summary of the issues involved in the appeal; some background information about the parties; the case and the process followed in family court; legal argument about each issue; and a statement of what the party who submits the brief wants the appeals court to do.

- *Oral Argument:* In some appeals courts, the parties are always asked to come to the appeals courthouse and orally present their argument. From the appeals court's viewpoint, oral argument is an opportunity for the judges of the appeals court to ask the parties or their lawyers questions about any areas of uncertainty in the case. It is somewhat unusual for pro se parties to present oral argument on appeal, but it has happened.

- *Appellate Decision:* The last step in the appellate process is for the appeals court to rule on the decision.

If the Other Party Appeals the Decision

If you are notified that the other party plans to appeal, your first step should be to decide whether to pursue your own appeal in response—usually called a cross-appeal. Read the previous two sections on how to assess your chances on appeal and on how the appeals process generally works. As soon as you can, check your state court rules on the deadline for cross-appeals—those deadlines are generally quite short.

In assessing whether to pursue a cross-appeal, consider the following points:

- You can't cross-appeal unless the family court ruled against you on some issue.
- Your chances of success are best if you can point to an error of law that affected the family court's decision. If you are arguing that the family court judge should not have accepted particular evidence or should not have believed a witness, you have a more difficult path.
- Your cost of pursuing a cross-appeal will be much less than if you were pursuing the original appeal, but there still will be costs, above and beyond any legal fees for your lawyer. There may be a fee just to file a cross-appeal. You will have to pay for your own copy of any trial transcript. There will be photocopy and postage costs for your brief.
- If you do cross-appeal, you have to see the whole process through or your cross-appeal will likely be dismissed, just as an original appeal is dismissed if the appellant does not follow the rules and complete the process.
- If you don't cross-appeal, you will have costs only if you decide to oppose the other party's appeal actively. Sometimes pro se parties choose not to file briefs, get copies of transcripts or show up at the oral argument, and often they still win. The reason is that, even if the appellee is a complete no-show during the appeal, the appellant still must convince the appeals court that the family court decision should be overturned, fully or partly. The risk of being a no-show, obviously, is that your voice will not be heard. The only arguments the appeals court will hear are those of the appellant.

After Appeal

Once the appeal and any cross-appeal are over, the court phase of a case ends at least temporarily, until one or both parties go back to court. The topic of going back to court is covered in Chapter 13.

Chapter 13

Round Two

Tweaks, Blow-ups and Life Changes:

Modifying Family Court Judgments and Decrees

“They always say time changes things, but you actually have to change them yourself.”

— Andy Warhol

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his chapter is about going back to court in your family case. Unlike most other kinds of court cases, family cases can come back to court many times over many years. Criminal cases end with an acquittal or a sentence; personal injury cases end with a jury verdict and a judgment. Maybe there is an appeal, and at worst a re-trial and another appeal. But after that, the case is done. Family cases can keep going and going and going, to quote a commercial.

The reason is quite simple. Criminal cases and personal injury cases focus on the past: Is the defendant guilty of the crime? Is the defendant liable to the plaintiff for negligence? Once those questions are decided, those cases end. In contrast, family cases usually focus on the future as well. The divorce judgment defines how long alimony will be paid; the parental rights judgment defines who has custody. Custody decisions usually last until the children become adults by law; alimony decisions can last for decades—as long as the ex-spouses are alive. If one or both parties want the custody or alimony decision adjusted, the case comes back to family court.

It is very common for one round of motions to modify to be filed, usually within eighteen months of the decision. The parties have now been living under the new structure for a while, and will likely have discovered adjustments that may need to be made in the children’s schedule or for other practical reasons. Similarly, it is not uncommon for one or both of the parties’ incomes to change significantly after a divorce, requiring readjustment of a support order.

The fact that people often have to abide by family court decisions for a long time is what causes family cases to keep coming back to court,

sometimes years after the original decision. There are two major reasons why family cases come back to court:

- One or both of the parties claim that the other party is not following the orders contained in the family court decision.
- One or both of the parties want the original decision to be changed in some way.

Chapter 14 discusses what to do when the other party is not following the court order, or what to do when the other party claims you aren't.

This chapter examines the procedure for changing existing family court orders. Every state has certain requirements that must be satisfied before the family court will agree to revisit a case and consider modifying a decision. Every state has a procedure to be followed in asking the court to modify an existing decision.

Requirements for Amending or Modifying Family Court Orders

Once the family court issues a final order in a divorce case or in a case involving parents who haven't been married, the court usually won't revisit the case unless something has changed. State law spells out the requirements for asking a family court to revisit a final family court decision, and the requirements differ from state to state.

The terminology for the process differs from court to court. Some courts call it "amending" an existing divorce judgment or other family case judgment. Others use the word "modify" to mean the same thing.

In any family court, whichever party is asking for modification has to prove that there is a good reason for the court to revisit the existing order and see if it needs to be modified. There has to be some limitation on revisiting court decisions; otherwise, dissatisfied parties would constantly be asking courts to revisit and change their decisions.

In some family courts, financial issues such as child support can be revisited every few years—the law in our state of Maine, for instance, says that child support can be revisited every three years. So all that the party who wants child support revisited has to show is that it has been three years since the family court last considered child support.

When it comes to children—custody, visitation and other non-financial issues—the law usually requires proof that something has changed before the family court will revisit the case and consider

modifying the order.

In many state courts, what is required to modify a family court decision is “a material and substantial change of circumstances.” A change of circumstances means simply a change in the parties’ situation. A material change in circumstances is one that affects an important aspect of the court decision. A substantial change is a change that is not minimal or minor. Other state courts use similar phraseology to define when a family court may consider modifying a prior decision. (In our state of Maine, for instance, the law refers to “substantial change of circumstances” but the phrase means essentially the same as “material and substantial change of circumstances.”)

Oftentimes, the parties will agree that the family court should revisit the case, but sometimes one party will claim that something significant has changed and the other party will deny that claim and object to any re-visitation of the previous order. In those cases, whichever party is asking the court to modify the order must show that some significant change has occurred, or will occur, unless the court acts.

Sometimes, the court will hold a hearing on whether there has been a change before considering whether to change the existing court order. Only if the court is convinced that there has been, or will likely be, a significant change in circumstances will the court hold a hearing on what, if any, modification to the existing order should be made.

On the other hand, sometimes the court will combine the two questions into one hearing. In such cases, the party asking for modification of the existing order must prove at the hearing that there has been a material and substantial change and also must present evidence on what modification in the existing order should be made.

Once either or both parties have decided to ask the family court to modify an existing order, whoever is requesting modification has to follow the court’s procedure for such requests. Usually the process begins with the requesting party filing a motion to modify and arranging for the other party to be served with the motion. The exact title of the motion and the process for filing and serving it are different from court to court—check with your family court’s clerk for guidance, if you don’t have an attorney.

Modifications by Consent

If you and your former partner are functioning as effective co-parents,

there will likely be enough communication for you to make simple, agreed-to changes without a formal court hearing.

Many states allow modifications “by consent” to simply be filed on paper. Our state requires that both parties must sign such a motion under oath, before a notary. In this situation a judge or magistrate will review the proposed change, and unless questions are raised in the judge’s mind, the proposed order may simply get signed without further ado. This is covered in more detail in the Tweaks section that follows.

Once a motion to modify is filed, the family court process may be similar to the process followed when the case first came to court. In other words, the court may issue a scheduling order for the case. The court may schedule a mediation session or require the parties to engage in mediation on their own. There may well be an opportunity for the parties to take discovery from each other. The court may schedule a pretrial conference as the case nears trial. Eventually, if the motion to modify is not resolved by agreement, it will go to trial. As noted above, sometimes the trial is “bifurcated,” meaning divided into two parts. The first focuses on whether there has been a change in circumstances that is material and substantial enough to justify revisiting the existing court order, and if so, the court then agrees to revisit the case. The second phase focuses on whether and how to modify the court order.

Either or both parties usually can appeal a family court’s decision on a motion to modify—whether the court agrees to the requested modification or denies it.

Tweaks, Blow-Ups and Life Changes

In our experience, there are three kinds of changes that come up in family court cases. We call them tweaks, blow-ups and life changes. A tweak is a minor change that the parties agree should be made to the original family court decision. A blow-up is a major problem that was ignored or hidden when the family court issued its decision, but blows up later on. Life changes are what happen after the family court decision was issued.

Tweaks

Examples of Tweaks

In the first few months or years after a family court decision, it is not unusual for the parties in the case to discover that parts of the

decision need to be changed in small ways, and they agree on the change. Examples:

- The divorce judgment says that Greg is supposed to pay Cheryl alimony of \$1,300 per month for the first five years, decreasing to \$700 a month for the next five years, after which alimony terminates. Greg has trouble coming up with \$1,300, so he proposes to Cheryl that he pay her \$1,000 a month for ten years instead of what the judgment says. He points out that \$1,000 a month for ten years produces the same total of payments—\$120,000—as does \$1,300 for five years and \$700 for five years. Cheryl agrees to the change. They file an agreed-on motion to modify the divorce judgment, and the court approves it within a few days, without requiring any hearing or other procedure.
- The parental rights and responsibilities judgment says that Joseph has visitation of his and Lisa's son Perry, age 6, every other weekend, plus any other visitation that he and Lisa agree upon. Joseph would like to see Perry at least once between his visits, so he proposes to Lisa that he have Perry overnight every Wednesday. Lisa, who wouldn't mind a weekday evening to herself, agrees, provided Joseph picks up Perry at day care after work on Wednesday, and makes sure Perry gets to school Thursday morning. Neither Joseph nor Lisa takes any steps to get the parental rights judgment changed to reflect Joseph's additional time with Perry. The risk to Joseph of not getting the judgment changed is that if Lisa changes her mind and takes away the Wednesday overnights, she can; whereas, if the judgment had been changed, she couldn't take them away without violating Joseph's rights. Should Joseph have gone back to court to get the judgment updated? It depends on how likely it is that Lisa will change her mind about the Wednesday overnights. And that likely depends, in turn, on whether she and Joseph have a solid co-parenting relationship.

Almost any family court decision may need tweaks, in areas such as the timing of payments or the specifics of visitation and transportation for children. The list of possible tweaks is long. In fact, many parties who are operating under a family court decision may have tweaked it without even knowing—by agreeing to a particular way of doing things without realizing that it is slightly different from what is contained in their family court decision.

Both of the examples above involve tweaks—relatively minor changes in the existing court order—that the parties agreed upon. A minor change in the existing order doesn't necessarily have to be agreed on, but if it isn't, odds are that it isn't such a minor change, at least in the

view of one party. That means it may fall under the heading of what we call a blow-up or a new development, both discussed later in this chapter.

What to Do About a Tweak?

If the tweak is agreed on, should the parties always go back to court and ask for the family court decision to be modified? In the first example above, the parties got the divorce judgment changed to show what had been tweaked. In the second example, they didn't.

There is no rule on whether to go back to court. Here are some of the factors you might consider if you are trying to decide whether to go back and ask the court to approve an agreed-on tweak:

- How likely is it that the agreement will last? If the parties trust each other and have a solid working relationship, they may not need to document every tweak with a motion to modify in the family court. If trust and that good relationship are lacking, whoever wants the tweak made permanent might be better protected by having the tweak approved in family court. On the other hand ...
- Will going back to court upset the apple cart? Sometimes one party agrees to a tweak only if the other party agrees *not* to go back to court with a motion to modify. That means the tweak can be terminated any time, and sometimes one or both parties wants to keep that flexibility.
- Does the tweak change financial responsibilities? If the tweak is a major change—for the better or for the worse—in one or both of the parties' financial situations, it needs to be approved by the court as a modification to the current court order. Most courts don't allow alimony or child support to be changed retroactively, so whichever party wants the change made should file a motion to modify promptly. Otherwise, the change may be ignored by the court or another government agency unless it is approved.

For example, Geraldine has been paying alimony and child support to George as required by the divorce judgment, but she loses her job and cannot find work. Even though she no longer has the ability to pay as ordered, Geraldine's obligations continue unchanged until she files a motion to modify the divorce judgment to reduce or eliminate her obligations.

In another example, John and Linda agree that John's child support obligation will be satisfied if John pays the entire private school tuition for their child George, age 13. Neither goes back to court to get

the child support order modified so as to eliminate child support and require John to pay tuition instead. As agreed, John makes the tuition payments to the school instead of paying Linda child support. Meanwhile, Linda loses her job and goes on welfare for a year. By law, the state welfare agency that made welfare payments to Linda can pursue John for the back child support that Linda was supposed to receive while she was on welfare, but did not because of the agreement. Because the family court order was never changed, John is liable for the back child support, and gets no credit for making all of the tuition payments.

- Is the tweak permanent or temporary? If the tweak is temporary, such as a change in the time or location of visitation resulting from a limited military deployment, it may not be worth going back to family court.
- Is there an ongoing need for tweaking? Sometimes people's schedules change so often that the days or dates for visitation, or the times and places for pickups and drop-offs, have to be flexible. In those cases, the details of visitation may differ from week to week, although the parties are still honoring the basic intent of the family court decision in terms of the level of visitation. In that situation, it is likely not be practical to ask the family court to approve the specifics of every tweak. Instead, what the parties could do is ask the family court to approve a change that eliminated the outdated details of visitation, and instead put into place a system for new and changing details to be agreed on.

How to Tweak Your Family Court Decision

If you have decided you need the existing court decision changed to reflect the tweak, how to approach it depends greatly on whether you and the other party agree. Every court handles requests for agreed-on changes to a family court order differently than requests for changes that are not agreed to. Your starting point might be to explain the situation to your court clerk.

You will likely need to file a written motion to modify the family court decision. The motion should spell out exactly what part of the existing decision you want changed, and exactly what the change would be. It is less important that you present the right legalese than it is that you make it very clear what you are asking the court to do.

To avoid having the motion go through your court's usual process for contested motions, you also need to show the court that the other

party does not contest the motion. In some courts, if the other party signs the motion along with you, or sends the court a letter stating agreement, the agreed-on motion bypasses the usual procedure for potentially contested family court matters, and is approved much more quickly. It may not even be necessary for you to go to court and speak to the judge.

Whatever the procedure proves to be for having your family court approve an agreed-on tweak to your divorce judgment or other family court decision, it surely will be much faster and simpler than if the tweak were contested. As we noted above, a contested tweak might be better called a minor blow-up, so we discuss contested tweaks along with blow-ups in the next section.

Blow-ups

What we call blow-ups are explosive situations that come about because the family court decision glossed over or buried a basic problem instead of dealing with it and the problem surfaces later on. Usually the reason why the problem was not dealt with is because neither party asked the family court to address it.

Most family court cases are resolved through settlement, without a trial. In order to reach a settlement of their divorce or parental rights case, people sometimes avoid confronting lurking problems that likely would prevent or complicate a settlement if the problems were confronted. Such settlements often don't really deal with the problems that destroyed the parties' marriage or relationship. In such cases, the problem that was covered over can blow up.

Here are some stories of how a lurking problem can become a blow-up later:

- Will and Grace were divorced on an uncontested basis. The divorce was triggered mainly by Will's raging and uncontrolled alcoholism, but no mention of that was made in the family court's divorce judgment, because Grace wanted to be done with the divorce more than she wanted to ask the court to address Will's drinking. Plus, Will promised her that he would sober up and he did stop drinking for a time. Now, six months after the divorce, Will is again drinking heavily, including during his weekend time with the parties' two children. He calls Grace late at night during the week, obviously drunk, and makes abusive and threatening comments. Grace also has some reason to believe he is driving drunk with the children in the car. Grace feels compelled to go back to family court and ask for

limitations to be placed on Will's visitation rights, and on his level of contact with her. A problem that everyone hoped had gone away has blown up.

- The divorce judgment stated that David has custody of his and Ellen's child, Mary, age four, and that Ellen has visitation "at all reasonable times as agreed on by the parties," with no specific days or times included. The divorce was uncontested, because both parties wanted to remarry as soon as they could. To get the divorce behind them, David and Ellen told the family court that they expected to be able to agree on visitation and thus did not need specific dates and times for visitation. They really hadn't come to grips with future visitation. It now turns out that Ellen wants more time with Mary than David is willing to agree to. She and David start a tug-of-war over Mary. A lurking disagreement that was smoothed over to get the divorce approved has blown up.

In our experience, blow-ups often lead to the bitter court battle that the parties managed to postpone by settling their case the first time it went through the court process, but blow-ups are not always contested.

For example, a parent who has a significant substance abuse problem sometimes agrees to get treatment and to have visits with the children limited for the time being. Sometimes they are hotly contested. When an area of disagreement has been ignored or smoothed over temporarily, the blow-up itself means that the disagreement has come to the surface and needs to be resolved.

Criminal Blow-Ups

It is not unusual for a blow-up in a family law case to result from a criminal charge against one of the parties. Sometimes the criminal charge involves the other party as the alleged victim—as when one party is charged with assaulting the other. Sometimes the criminal charge does not involve the other party, at least directly—as when one party is charged with drunk driving.

If the other party in your case is charged with a crime, what should you do? If you are charged with a crime, what can the other party do? A good starting point is to focus on how the criminal justice system works, and how it relates to the family court system.

Arrests and charges are normally based on probable cause—reason to believe a crime has been committed—whereas a criminal conviction usually requires proof of guilt beyond a reasonable doubt. Thus, the fact that someone has been arrested or charged for a crime does not mean that the person is guilty, or that a family court order should

automatically be changed. The key word is “automatically,” because if the same conduct that led to the arrest or the criminal charge is proved at a trial in family court, it can lead to the family court order being changed. The change is the result of the family court deciding that the conduct probably happened, and not based solely on the fact of an arrest or a charge.

However, long before innocence or guilt is determined, bail conditions are likely to be imposed. If there has been an alleged assault, it is common for the court to impose bail conditions that include “no contact, direct or indirect, with the victim.” Bail conditions trump family court orders. If a bail condition is more restrictive than a family law order, you still have to obey it unless it is lifted or changed. Violation of a bail condition is usually a separate crime, and could well result in your being held in jail while you wait for a trial date.

A criminal conviction is different, because it means the person charged is guilty. Most criminal convictions result from pleas of guilty or no contest, but some result from trials. If there is a dispute about whether there was a criminal conviction, or about what the conviction was for, a certified copy of the criminal conviction is the best way to resolve the dispute.

Some criminal convictions can definitely affect a family court order—for instance, any family court will consider modifying a court order based on one parent’s conviction for assaulting the other or for assaulting a child. Other convictions can also have an effect on a court order. For instance, a parent’s conviction for drunk driving or other driving offense may limit the parent’s ability to drive with the children. Still other convictions may have little to do with family court, unless the conviction results in a parent going to jail or prison, or affects a parent’s ability to support a child.

Figuring out whether a criminal charge or conviction will affect a family court order is usually a matter of common sense. Does the charge or conviction have a bearing on the fitness as a parent? Does the charge or conviction call into question the safety of others?

Generally the party who claims there has been a blow-up has the obligation to prove the claim.

Here are some factors we suggest you consider if you are in the middle of a blow-up.

- If you are the party who is concerned about the blow-up, can you prove what you are saying? Can you also prove that the court should change the existing family court decision in the ways you are proposing?

- If you are the party accused in the blow-up, how likely is it that the other party will be able to prove the truth of the accusation?
- Can it be resolved by agreement without a contested court hearing? Note that we are not suggesting it be resolved without going back to court. By its nature, a blow-up is something that one or both parties feel so strongly about as to want the court order changed. The question is, will the change be agreed to or will it be the subject of a trial?
- What is the solution that comes closest to addressing the problem while honoring the family court decision? What judges sometimes see when people come back to court because of a blow-up is that one party says the blow-up is the end of the world whereas the other says it is no big deal. In those cases, the judge may decide neither party's take on the situation is accurate: It isn't the end of the world, but it is a significant concern that needs to be dealt with.
- Can the blow-up be resolved without bringing it to family court? By its very nature, a blow-up is a sudden, often upsetting event. Some blow-ups need to be brought to the attention of the family court; others don't. In either case, the family court will expect that the parties have tried to work out their differences before coming back to court. So, you and the other party should ask yourselves: Are there steps either party can take to resolve the issue short of going to court?

Life Changes

Life changes happen all the time to all of us. People move, people change, things change, and life brings change.

The difference between what we call a blow-up and what we call a life change may not always be clear. For example, when two parents come from different parts of the country, it may be obvious from the first day of their separation that the parent who has family far away will be going home, with or without the children. In one sense, the move is a life change because it was going to happen from day one. But because the parties did not want to have to deal with it during their divorce, it could be considered a blow-up.

Examples of Life Changes

Life changes come in many shapes and sizes. Some examples:

- You or the other party plan to move to another part of the country or another part of your state

- Your teenage child decides she wants to move out of your house and live with the other parent, or vice-versa
- One of you experiences a major change in physical or mental health
- One of you loses your job
- One of you is transferred in her or his job to another part of the country

The Effect of Life Changes

Life changes may mean that one parent asks the family court to reduce or increase child support or to reduce or increase alimony; or to change custody of a child; or to allow a child to be moved far away. Many life changes involve very significant changes in the court order.

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The procedure the family court uses when one or both parties come back to court with life changes is similar in some respects to the procedure for cases coming to court for the first time. There may be interim hearings and orders, discovery, pretrial conferences and orders, and trial. In other respects, the process is different. One difference is that, as noted earlier in this chapter, the party who is bringing the case back has to prove that the life change is significant enough to justify revisiting the case.

Here are a few illustrations:

- Losing your job may or may not be enough to bring the case back to court. If you quickly get another job for comparable pay, you likely have no reason to ask for your child support to be reduced.
- If your new job requires extensive travel, however, that might support bringing the case back to court to adjust the visitation schedule.
- If you can't get another job with comparable pay, then you may be successful in asking the court to reduce your child support or else increase the other party's child support.
- If the other party has custody of the children and is arrested for drunk driving, that alone likely will not support any change in custody, because an arrest is not proof of guilt. An arrest for abusing your child would be different—that has a direct bearing on parenting and the court would want to look into the situation. Also, the child

welfare authorities might support your request for a change in custody.

- If the other party is convicted of drunk driving, you may still not be able to convince the court to change custody, especially if your child does her or his own driving and isn't dependent on the other party for transportation.
- If the other party is convicted of abusing your child, your prospects of getting a change in custody are very good indeed.
- If the other party is sentenced to a year in jail, regardless of the type of crime involved, then you have a very good chance because the other party will not be available to parent the children while in jail.

In addition to showing that the life change justifies revisiting the existing court order or judgment, the moving party must show that they are entitled to the change they are asking the court to make.

Court Procedures for Coming Back

Depending on the nature and scope of the change being requested, a motion to modify may involve discovery, mediation and all the other phases and features we described in previous chapters, leading up to a full blown trial. Our previous Chapters 8, 10 and 11 should be helpful.

Chapter 14

Round Three (or Four, or ...)

Motions to Enforce or for Contempt

“JUDGE: *Are you trying to show contempt for this court?*”

MAE WEST: *On the contrary, Your Honor, I was doin’ my best to hide it.”*

— My Little Chickadee (1940)

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ost people think that the most important part of getting what you want in any kind of court case is getting the judge to decide in your favor. While this is certainly a necessary step, it is not always a sufficient one. In fact, the most important step is actually getting what the judge has decided you should receive—be it time with children, or money, or anything else.

In family law matters, getting the relief that you are entitled to under the court’s judgment is often more complicated than simply collecting money from the other side. Sometimes that’s the issue, or at least the most important one. Other times it may be getting the other party to comply with a visitation schedule, or to turn over items of property you have been awarded. Whatever the issue is, we suggest that you attempt to employ a graduated approach to obtaining whatever your judgment entitles you to.

Step One—A Reasoned Discussion

Step one is simply to have a discussion about the issue with your former partner. Sometimes just a discussion can resolve whatever the issue might be. Even if it can’t be resolved, a documented discussion that shows that you have attempted to be reasonable will serve you well if there is a need to return to court. It may seem like begging to you to have to call the other party and ask that party to do what the court has already ordered. It’s not an easy or pleasant process to engage in, and you probably feel the other party should simply do what’s right without being asked.

This may be so, but sometimes a simple discussion is all that is necessary to resolve a problem. For example, if you have not received

a child or spousal support check on time, you may be assuming that the other party is refusing to pay and you should file a contempt motion. If in fact the check was delayed for legitimate reasons, and the other party is about to or has already sent it, a contempt motion is an overreaction which will likely inflame future interactions to no good end. Another possibility is that you can use a discussion to focus on the real world impact it will have; for example, “John, please send the child support check right away. If I don’t have it by next Wednesday I won’t be able to pay the fee for Bobby’s summer recreation program; and, you know how important summer baseball is to him.”

While you may begin by having a telephone conversation, the secondary purpose of having this kind of discussion is to create a record in case you do have to return to court. You should follow up your telephone conversation with a confirming letter or e-mail or, if your first attempt has not been successful, send your second communication in writing.

Another possible means of avoiding further court hearings is to use other intermediaries. Getting a third party involved in your family court dispute can be risky for several reasons, and can worsen the situation. However, sometimes it works. If there is a person you and the other party both trust and respect, such as a family member you both like, it may be possible to have a conversation along the lines of this: “You know our divorce judgment ordered that Sally had to (insert nature of dispute), and she won’t do it, even though I’ve asked. I don’t want to go back to court and neither should she. It will cause more trauma and cost us each money we don’t have. Would you be willing to talk to her and see if it can be worked out?”

Lawyers are often very useful intermediaries in resolving post-judgment disputes. They will have a very good sense of what a judge is likely to do if he or she concludes that a court order is not being complied with. They can, and often will, take their client to the woodshed and introduce the client to the reality of the situation. You should not expect that you will ever know this occurred, but it can be helpful. Similarly, your lawyer may take you to the woodshed, and convince you to comply with a previous order, even if you don’t want to. After all, which is worse – getting a stern private lecture from your lawyer, or getting a stern public lecture from the judge, perhaps followed by a fine or jail sentence?

Step Two—Enforcement Without a Court Hearing

In certain situations, you can use the authority of the court to enforce your judgment without having to file a motion or actually return to court. For example, we will assume that you didn't ask the court to set up a payroll deduction plan for payment of child or spousal support at the time of the original case because you thought the other party would pay reliably. She or he did so for a while, but now delays are becoming more of a problem. You may be able to simply file a motion with the court asking the court to issue an "immediate income withholding order" which is available under federal child support enforcement law. Since this kind of order is available as a right to any person who is a recipient of either kind of these payments, the court may simply enter such an order without holding a hearing.

If you are trying to get the other party to pay you money, another approach may be to use the process available in your court for collecting on court judgments. This process works best when the party who owes money has significant equity in property, such as real estate or valuable personal property. In many states, a party who is owed money under a court judgment can obtain a "writ of execution" from the court, and use the writ to seize property of the person who owes money on the judgment. Usually, the procedure calls for the local sheriff to use the writ to seize property and either turn it over to the party who is owed money, or sell it at public auction and turn over the proceeds of sale.

If the other party does not have equity in property that can be seized or turned over to you, your best method for collecting what is owed is likely to go back to court with a motion to enforce or a motion for contempt.

Tow the State's Car

When I was a young lawyer practicing in another state, one family lawyer obtained a judgment for \$200 in attorney's fees against that state's Department of Social Services. DSS officials refused to pay the \$200, but this lawyer knew where the (unpopular) enforcement agent parked the state car that had been assigned to her. He obtained an execution from the court clerk for \$200, went to the sheriff, and had the agent's state-issued car seized and towed to boot (so to speak). The state quickly decided to pay the \$200 it owed, and the lawyer became a local legend.

— J.D.K.

Step Three—Motion to Enforce

If steps one and two have not worked, you can file one of two kinds of

motions (or both) with your local court seeking the court's assistance to force the other party to comply. These motions are known as "motions to enforce" and "motions for contempt." Courts have broad equitable authority to enforce the court's judgment under either kind of motion. When we present legal trainings, either to law students or practicing lawyers, we often suggest that you should file a "motion to enforce" as opposed to a "motion for contempt" unless you seriously want the court to consider sending the other party to jail.

You Can't Have Contempt if the Order Isn't Clear

A very common mistake that people representing themselves (and even lawyers) make is to bring a contempt motion when they really don't have a basis in the court judgment or order to do so. To prove contempt, the moving party has to show that the other party has deliberately disobeyed a court order or judgment. If the meaning of the court order is not entirely clear, or if the court order is worded in general rather than specific terms, it may be impossible to prove contempt.

For example:

A divorce judgment that says the father has custody and the mother can have visitation "at any reasonable time by agreement of the parties" doesn't lend itself to contempt. If Mom tries to have Dad held in contempt for insisting that her weekend visits start Saturday morning instead of Friday night, she's going to have a tough time. On the other hand, if Dad tells her he will never agree to any visits ever, she has a better chance. But her best bet is, instead of asking the court to hold Dad in contempt, file a "motion to modify" that asks the court to translate the general visitation terminology into specific visitation days and times through what in our state is called a "motion to enforce."

In our state, people have to decide whether to bring a motion to enforce (asking the court to make the terms of the judgment more specific) or a motion for contempt (asking the court to force the other person to stop deliberately disobeying the specific terms of the judgment). If you bring a contempt motion when you should have brought a motion to enforce, the court will deny your contempt motion because the order isn't specific enough to support a finding of contempt, and you have to start over by filing a motion to enforce. The procedure may be different in your state's court. Check with the clerk's office or your court website for guidance.

We suggest use of a "motion to enforce" for two reasons. First, in our state and in many other courts, the standard of proof is different for a motion to enforce and a motion for contempt. In order to prevail on a motion to enforce, the person bringing the motion needs to provide

enough proof to convince the judge that the other party is failing to comply with the judgment by a “preponderance of the evidence.” (That is, it is “more likely than not” that the person has not complied.) However, in order to prevail on a motion for contempt, the person bringing the motion must show that the other person is willfully in contempt, and that he or she is able to comply with the court order and chooses not to do so. In our state, both of those elements must be proved by “clear and convincing evidence.” This is a significantly higher standard of proof, and the judge must be firmly convinced of the other party’s contempt. So, if the relief you seek can be ordered by a motion to enforce it is more likely you can prevail using that tool.

The second reason we suggest this method is that unless you really want the court to consider putting the other party in jail, it is likely to be counterproductive to serve that party with a “contempt subpoena” that threatens to do just that.

Motions to enforce or motions for contempt are usually filed after the court has issued a final judgment. As a result, unless the original case remains pending for some reason, the motion to enforce must be served on the opposing party in the same way that a new case must be served under your state’s laws and rules. Once the motion has been served on the other party, that party has a deadline to file a formal written response to the motion. That party’s response is called an “objection.” The court will generally take no action on the motion while waiting for the other party to file his or her response.

If you are served with a motion to enforce, it is very important that you file your objection with the court (and with a copy to the other party) *within* your deadline. If you do not do so, the court will be very likely to grant the motion to enforce without any further notice to you and without a formal court hearing. Unlike original family law actions, there are very few built-in safeguards or waiting periods, so if you do not respond to the initial written notice, you may lose any right you have to contest whatever it is that the other party is requesting the court to do.

Procedure on a Motion to Enforce

Let’s assume you filed a motion to enforce and the other party has filed an objection. The first thing to do is carefully review what the other party has said in his or her objection. Is it true? If it is true, is a judge likely to think that the person has a good excuse for failing to comply? If so, perhaps it’s time for another communication to see if you can resolve the case without a hearing. If not, you will have to

prepare for another court hearing, which is like a mini-trial.

Depending upon the specific rules in your state and local practices in your court, the court may require you to attend some kind of case management conference so that the court can figure out how long it will take to hear your motion and how complicated it's likely to be. The court may require you and the other party to attend mediation before the actual hearing on the motion. Other courts handle these motions differently and may set either a final hearing date for the motion or a triage date, meaning a date on which the parties and lawyers come to court and attempt to work out their differences by agreement. You will need to check with your local clerk's office to figure out which kind of process your court uses. For example if your court sets motions to enforce on a triage date, you will have to come to court but you will not want to bring the five witnesses you may need to prove your case, as the evidence will not be taken on that day. Alternatively, if your court sets motions to enforce for an immediate final hearing you will have to bring those five witnesses with you, or you may be unable to prove your case and will lose the motion!

However quickly or slowly you get to the stage of a final hearing on your motion to enforce, you must treat that hearing like a trial. You will have to prepare an outline of what you intend to cover and then construct a game plan to assemble your evidence. In order to win a hearing on a motion to enforce, you will have to convince the judge that it is more likely than not that what you are saying is true. It is very important for you to realize that if the issue does not involve a continuing duty on the other side, such as weekly payments of child support, courts use a "one bite at the apple" rule on these kinds of motions. So if your complaint is that the other party failed to comply with the judgment by signing a deed over to you and you lose the motion to enforce, it is very likely that the court will dismiss any future motions on the same issue. The legal terms for this rule against re-litigation of the same issue are "collateral estoppel" or "res judicata."

In fact, these doctrines can be even more dangerous. They not only apply to issues that were actually litigated, but also to issues involving the same party that could have, or should have, been tried at the same time. So, if the other party failed to sign over two deeds to you, six months apart, and you bring a motion to enforce on one failure but not the other, the res judicata or collateral estoppel doctrines may prevent you from filing another motion later on the second failure.

Step Four—Motion for Contempt

The ultimate tool for enforcing a judgment is to file a motion seeking to hold the other party in “contempt of court.” There are three kinds of contempt of court.

The first is the kind you have seen on TV, which occurs when a judge holds someone in contempt for bad behavior in the courtroom. This is called “summary contempt.”

The second kind is used when a party wants to punish someone for past, completed, contemptuous acts. This is called “criminal contempt.” It is rarely used and can be very complicated. Criminal contempt motions are usually brought by the local district attorney, although the court can appoint another attorney as a special prosecutor. You may think this is what you want to do—to punish your spouse for past bad behavior, but it is generally *not* a good idea to try to pursue criminal contempt. Criminal contempt has to be proven “beyond a reasonable doubt,” and in certain situations the court may be required to appoint an attorney to represent the other party. Depending on the situation, the other party may even be entitled to ask for a jury trial.

The third type of contempt is by far the most common type—“civil contempt.” In a civil contempt motion you are asking the court to use its power to compel the other party to do something or stop doing something—usually to stop violating a court order, or to stop failing to comply with what the court has previously ordered. You may expect that if you win your motion, the other party will be taken off to jail for some specified period. This is not likely to happen, on two grounds.

First, judges are actually reluctant to send people to jail for contempt. It costs the taxpayers lots of money to hold someone in jail, and in most states, the jails are overcrowded with actual criminals. Jail is the court’s ultimate sanction, and judges know that the threat of jail may actually work better to force compliance than the reality of it. They also want to reserve the jail sanction for very serious cases. In less serious cases, they may tell the other party to pay your attorney’s fees, to pay an additional civil penalty to you, or both. Judges also don’t want to kill the goose that lays the golden eggs—if your ex-partner has not been paying her or his child support, it won’t really help you or your child to send that person to jail, which would either disrupt the other person’s earning capacity, or force the payor to lose her or his job, or both.

Secondly, however emotionally satisfying it may be for you to see

your opponent led off in handcuffs, there can be significant practical reasons for the judge not to want to immediately impose a jail sanction. In small courthouses, the judge may not have another bailiff available to take a person into custody. Or, if the jail is located some distance away from the courthouse, prisoner transport may not be available. In most cases, even if a jail sanction is appropriate, the judge will consider these factors and also give the other party one last chance to comply by issuing a sentence but delaying its execution to a specified date when the party in contempt has to report to serve the sentence.

In civil contempt cases, the purpose is to force the offending party to comply with the court's order. As a result, the judge must provide a mechanism for the offender to "purge his (or her) contempt." For example, if the other party has not paid \$1,500 in child support, the judge may order a jail sanction, but allow that person to purge the contempt by paying the \$1,500 in arrears at any time. As an often quoted figure of speech says, the person sentenced for civil contempt "holds the keys to the jail in her (or his) hands."

A word of caution—while judges have a number of practical considerations that cause them to be cautious about jail sanctions for contempt—there are limits to this caution. If a judge thinks that you have the ability to comply with a previous court decision and are choosing not to do so, the judge will very likely see this as a challenge to his or her legitimate authority; a cavalier disregard for the harm the contempt may have caused to the other party, both parties' children, others, or all of the above. If so, the judge is likely to be *very* unhappy, and we hope for your sake that you brought your toothbrush with you to court.

We both have unhesitatingly sentenced persons who are willfully in contempt to jail, and we expect we will do so again in the future. The situation where it is most likely that a judge will think it sufficiently important to impose a jail sanction is for chronic non-payment of child support. Much like in juvenile criminal cases, the offending party may have built up a false sense of security because the court has not yet imposed a jail sentence. It is easy to misinterpret a judge's reluctance to send people to jail as a license to continue bad behavior. However, every string has an end, and ultimately the court may conclude that you have reached the end of your string. At that point, it is way too late to ask the judge for one more chance—that opportunity came and went some time ago!

Cruise Spending Money

I once handled a contempt motion about non-payment of child support. The father really didn't think he should have to pay support, and had not paid a dime for the first twelve weeks the order went into effect. The hearing was pretty predictable most of the way through. Then, the mother's attorney asked the father to take out his wallet. He had about \$400 in cash in it! The mother's attorney asked me to order him to turn it over, which I did. The father looked at me and said "Judge, I can't do that. That's my spending money for the cruise I'm taking tomorrow."

I replied "Maybe, maybe not." I then held him in contempt and had him taken into custody (i.e. jail) on the spot. I later learned that his family came over to the court with all of the money I had ordered paid, so I guess the clueless dad got to go on his cruise after all.

— J.D.K.

A Final Caution

Even if you had an uncontested divorce to start with, or a low-conflict one, multiple post-judgment motions to amend, to enforce or for contempt can be just as corrosive to a family and exhausting for the parties as a very high-conflict divorce case.

This is not a cycle you want to find yourself in. If it seems to you that you are heading down this path, please read our previous section cautioning against "tit for tat" motions, and review Chapter 9. If at all possible, see if you can break this pattern before it becomes entrenched.

Chapter 15

Starting Over, Achieving Peace

“The human soul, the world, the universe are laboring on to magnificent consummation. We are not fashioned marvelously for naught.”

— **Ralph Waldo Emerson**

Journals, 1820

“I do not want the peace which passeth understanding.

I want the understanding which bringeth peace.”

— **Helen Keller**

S

o, you have gotten through it, however quickly or slowly, however painfully or easily, however cheaply or expensively. You have been through the fiery furnace in one way or another, and have come out the other side. You have been through one of the most significant transitions you will ever experience in your life. Whether after one round, or two, or even three or more, you don't expect to have to go back to court again.

It is now time to get on with the rest of your life and make the practical arrangements you need to make. At the same time you also must make the necessary emotional adjustments to being single once again. Most importantly, how do you integrate the lessons you have learned from this process, so you can avoid having to repeat it?

In this chapter, we will review both some practical suggestions about the nuts and bolts of this transition and offer some broader observations about the more significant and longer-term lessons you can use to improve the quality of your life. Perhaps the most important insight we hope you can take away from this chapter is: *It is very possible for you to reflect on the patterns in your previous relationship or relationships that brought you to court, and make changes which will help you from repeating those patterns.* We hope that you can avoid the trap, which we have seen far too often, of re-creating the problems that led to the end of your past relationship in a new one.

You may well have a continuing relationship with your former partner

around your children, or for completing the sale of your former residence, or for any one of a host of other reasons. It is important that you understand the boundaries of continuing that relationship. It is very necessary that you respect those boundaries. If your former partner is having trouble recognizing those boundaries, you will have to enforce them. We will go into detail about the emotional boundaries later but your first step is to ensure that practical boundaries are constructed, and new arrangements made.

First Things First, Lay a Practical Foundation

It is critically important that you separate your finances from those of your ex-partner to the maximum possible extent. If there are joint bank accounts that you have been given control over, establish new bank accounts in your name only, move money into your new sole accounts, and close the joint ones. If there are any debts that you have been given responsibility for that are joint in both names, *it is imperative* that you take action to prevent your ex-partner from increasing that debt. Contact the creditor and have your partner removed from the account if possible. If that's not possible, ask the creditor to freeze the account, so that no one can make additional charges. If the creditor cannot or will not do so, your only option may be to refinance debt with a new source of credit, and pay the joint account off. You can then begin payments on the refinanced accounts that are now only in your name.

New Debt; The 45 Year-old Teenager in Best Buy Phenomenon

There is often a freeing sensation at the true end of one of these cases. One partner and perhaps both are now ready to enjoy their new-found freedom, which probably involves living out some long held desires that have been repressed, often for good reasons such as raising children or exercising fiscal responsibility.

One of the obvious ways this new freedom is acted out is in beginning to take steps to find a new partner. However, there are other ways this can be expressed. One of the more common scenarios, especially for guys, is a trip to Best Buy, credit card in hand. Now he can finally get that 50 inch plasma TV he's been secretly or not so secretly coveting, coupled with a 5:1 killer sound system, blue ray disc player, Tivo recorder, and, for good measure, a companion computer for streaming videos, movies and songs off the net.

So what if it costs \$7,500? So what if the effective rate on the credit card will be 19% per year after the first six months, or 29% if two payments are late?

Everyone has his or her own particular set of temptations. For some, the long-held dream is a Caribbean vacation. For others, plastic

surgery or cosmetic dentistry. For others, a new Harley-Davidson. Fill in the blanks.

The point is you *really* don't want your recently divorced ex-spouse financing her or his particular spree on a credit card or an equity line for which you are still partially legally responsible. If it happens, and the former partner is laid off in six months you may find the creditor knocking on your door, and the good credit rating you have worked hard to achieve suddenly ruined.

You have to protect yourself from this possibility. Terminate all the joint accounts you know of, then get copies of your credit reports from all three major credit agencies (Equifax, Experian and TransUnion); you are entitled to one free report per year. Go to <http://www.annualcreditreport.com> or call 1-877-322-8228; for a small additional fee you can get your credit score or FICO.

Assets

If you have been allocated joint assets by your judgment, it is also important to clearly place those assets into your sole ownership and beyond the control of your ex-partner. One of the most important reasons to try to achieve this complete financial separation is to keep those assets from being attached by a creditor if your former partner makes bad financial choices.

Real Estate

If you have been allocated a piece of real estate, you need to establish that allocation in the "chain of title" to that real estate. The cleanest way is for your former partner to sign a quitclaim deed that you can then take to the appropriate registry of deeds and have recorded. Alternatively, you may be able to have the family court clerk issue you an "abstract of judgment" which includes the portion of the judgment giving you the property, and then have that abstract recorded at the deed registry.

Most likely, if you have been allocated a piece of real estate, you will also have been allocated the responsibility of paying the costs associated with it. Notify your town that you are now the sole owner so that town tax records are accurate. Make sure that the homeowners insurance has continued in force, and designate yourself as the sole payee in case there is a loss. Contact the utilities, and set up new accounts in your name. (A favorite trick of mean-spirited ex-partners, whether during or after the divorce, is to simply call the utility company and instruct the utility to terminate the existing joint account.)

Vehicles, boats, etc

If you have been allocated a vehicle, boat or other motorized device that has been registered or titled in both parties' names, you will have to go to the motor vehicle department with a certified copy of your judgment. Preferably, the title and registration, including the transfer sections putting the vehicle into only your name should be filled out and signed both by you and your former partner. If you cannot obtain a signature on these forms, you should be able to get this process completed anyway via the certified copy of the judgment, but it can be a far more time consuming process, with additional headaches and fees.

Retirement Assets

If you have been allocated a share or all of a qualified retirement plan (a plan that is approved by the IRS, but that is not "portable," such as a traditional defined-benefit pension plan) you have to ensure that an appropriate qualified domestic relations order (QDRO) is prepared, approved by the plan administrator, submitted to the court for signature and then returned to the plan administrator.

If you have been allocated a 401(k) or other "portable" retirement asset, it is important that you roll that asset over into an existing IRA that you hold only in your name; or, that you establish a "rollover IRA" and transfer the assets you were allocated into it. Unless you are absolutely compelled to do so by *dire* financial need, you should *not* withdraw any funds from an IRA. An early withdrawal from an IRA is a taxable event; you will have to pay ordinary income tax on the amount of any funds withdrawn *plus a significant penalty* for an early withdrawal.

Changing Names on Accounts

If the divorce judgment gave you the right to resume a former name, you should obtain at least three certified copies of that judgment from the clerk. Use those copies as soon as possible to change the name on your driver's license, passport, and Social Security administration account. Having done so, it should be easy for you to use those revised documents to change your name for your bank accounts, credit cards, library cards and the like.

Investment Assets

If you have been allocated any significant sum of money by the judgment, you should consult with a financial adviser about how to

best manage those assets. If you have not had a financial adviser in the past, now is a good time to try to find one. Your previous joint financial adviser may want to maintain a continued relationship with your former partner. If so, we suggest that you may be well advised not to continue to use that adviser. A new adviser will not have any lingering legal or emotional conflicts of interest, and may be more likely to see you as an autonomous investor.

There are many different types of financial advisers, and you will have to choose one best suited to your particular situation. If your financial situation is complicated or if you expect to have to file complex tax returns that are outside your comfort zone, it is best to establish a continuing relationship with an accountant. We suggest that it is far better to find an accountant (not necessarily an expensive one) with whom you can have a personal relationship over a period of years, as opposed to going to a mass market “tax return preparer.”

If you have investments of less than \$100,000, it is probably unnecessary for you to have a continuing relationship with an investment adviser. It may be a very good idea to consult a financial planner for a one-time analysis of your situation and to develop an appropriate asset allocation strategy. For many people with modest amounts of investment funds, it might be suggested to invest in a combination of no-load market index funds with relatively small ongoing administration costs, such as those offered by Vanguard, Fidelity, Charles Schwab or other reputable financial providers. If you have investments of more than \$100,000, we suggest that you will be best served if you can find an investment adviser who does *not sell any products* but who provides investment management for a fixed percentage fee; this is most often 1% per year. Unbiased and competent financial advice can be hard to find, but if you have not had much previous experience in managing your money, we urge you to “measure twice and cut once.”

Recently divorced people who suddenly have funds to invest can be prime targets for persons who market extremely expensive investments where the costs are hidden in the fine print. If you have a lawyer or an accountant, she or he will likely have a very good sense of who are the competent and responsible investment managers in your community and can provide you with a referral or a short list of good professionals from whom you can choose.

Health Insurance

If you are the party who has been providing the family's health

insurance, you will need to contact the insurer, and delete your former partner from coverage (unless you have one of the very rare plans that allow you to provide coverage for a former partner) to preserve your coverage and coverage for any children. If you are the party who has not been providing the coverage, and you have coverage available at your employment, you should contact your human resources department to establish coverage for yourself, and, if you are to be responsible for this under the judgment, for your children. You should not need to wait until your insurer's annual "open enrollment" period to make this change. You also will probably need to provide a certified copy of the judgment to your HR department.

If your employer does not provide affordable health coverage, this can be a very difficult issue. You will likely be eligible to continue your coverage on your former partner's insurance plan for eighteen months under a provision of the federal employee benefits laws that is universally referred to as "COBRA coverage." The insurer is required to send you information about this coverage if the insurer has been notified by your former partner or the partner's employer to drop your coverage. Unfortunately, you will need to pay both the previous "employee share" of the cost, and the share previously paid by your former partner's employer as well. This coverage is likely to be very expensive. Much will be going on in your life at this point, so you may want to carry the COBRA coverage for at least a few months while you explore other alternatives. This option may be particularly important if you have any kind of health problem you have been treating. If coverage lapses, even for a relatively short time, a subsequent lower-cost insurance provider may refuse to cover any treatment for this illness under a "pre-existing condition" exclusion.

Alternatively, depending on the laws and rules in your state, you may be eligible for Medicaid, Medicare, or some other insurance program that is fully or partially subsidized by your government. Eligibility requirements can be complex; you can begin exploring your options by contacting your local Department of Social Services Office.

If all else fails, and you have some money in the bank that you won't need to use for a while, you can buy relatively inexpensive catastrophic medical insurance coverage, with a high deductible (\$5,000 – \$10,000) You are then self-insuring your routine medical costs or modest hospital bills, but are protected from financial disaster if you suffer a serious illness or require major surgery.

If you had life insurance before the divorce you should try to keep it in effect, as it is likely that you were rated for it when you were younger or healthier, or both. Other coverage is likely to be more expensive. If your former partner was the primary beneficiary, you may want to provide that benefit to someone else, unless your family court judgment requires you to continue to keep your former partner as the beneficiary. (See Chapter 3. These provisions are commonly required by the court when one former partner is required to pay the other alimony).

If you have not been carrying life insurance, you should evaluate whether you really have any need for it, at least above and beyond a modest “burial insurance” policy. If you conclude you do need new or additional coverage, it is usually recommended that you purchase a “term” policy, as opposed to a “whole life” type of policy. Rates are significantly lower if you can find some kind of group coverage, through your work, or through some other organization you belong to. (Many colleges offer relatively inexpensive group coverage plans through their alumni associations.)

Your Will and Advance Directives

It is always better to have a will than not, so if you don’t have one, please take this opportunity to get one. If you have a simple plan for passing on your assets and mementos, a will created by filling out a form should be adequate. You can buy form wills at office supply stores. You can often find a form online at your state’s office of elder services, or you can purchase inexpensive software such as “Willmaker.” Every state has requirements for how a will should be properly executed and attested, so make sure the form you use is one that is specific to your state.

If you have significant assets or a complicated plan to distribute the assets you do have (such as putting property in trust) you will want to consult with a competent estate planner. Future planning is especially important if you want to reduce the amount of estate taxes that will ultimately have to be paid. Your lawyer may be able to assist you with this, or if not, will certainly be able to provide you with an appropriate referral. If you don’t have a lawyer, the state or local bar association in your area usually has a “lawyer referral service” which can get you an initial consultation at a reduced rate.

If you already have a will, your former partner is likely the designated primary beneficiary. If you want to leave that as is, fine. If not, have a new will prepared with a new plan for distributing your things. The

probate court will *not* rewrite your will for you if you die unexpectedly after you have divorced.

Even if you don't think you need a will, everyone should have an "advance directive," that is, a legal document that designates who is authorized to make health care decisions for you if you are incapacitated and unable to make the decisions for yourself. If you and your partner had reciprocal advance directives prior to your divorce and your divorce was amicable, you should discuss whether or not to change them. If your divorce was less than amicable, you should execute a new advance directive that designates a new decision maker. You should make a copy for your chart at your doctor's office, and, if your local hospital keeps such documents on file for non-patients, make a copy for their records too. Anyone who has a copy of your previous advance directive should be sent a letter informing them to return it to you or to have it destroyed.

Construct a realistic budget

Please go back and review Chapter 3. This is likely to be a time of significant financial stress. The temptation is to celebrate your new-found freedom, and to purchase those things you wanted to buy, but couldn't, during your relationship. **RESIST!** While it is probably an emotional and psychological necessity to buy or do at least one thing that you consider to be a major treat for yourself, one thing can easily turn into five, or ten, or twenty, nice things that you really cannot afford, but start to put on a charge card anyway. **RESIST!**

As we have previously covered in detail, unless you have been unusually fortunate, your standard of living will likely suffer as compared to the past, at least for some period of time. You will have to make a hard-headed assessment of your new reality, whatever it is. If you do not have sufficient income to cover all your expenses, you have to reduce those expenses. If you can't reduce your expenses enough, then you may have to take extraordinary steps to supplement your income, such as getting a roommate or roommates to share household expenses, or taking on a second job, or both.

If you have been allocated the house or other real estate or a vehicle that has a significant monthly payment, you really have to evaluate whether you will be able to cover the ongoing costs that go with that asset. If the budget tells you can't, and if you can't adjust the budget enough to cover these cash-flow needs, you will be far better off if you make the hard decision to sell that asset before it drains too much of your limited cash, rather than after. You are almost always better off

if you can control a sale, as opposed to having others control the process, as in a home foreclosure or vehicle repossession.

Next most important—take control of your future

What do you want your life to look like in five years? In ten years? Where do you want to be living? What do you want to be doing? Do you want to be in another long-term relationship? If so, with what type of person are you looking for?

For all of the downsides, one of the great upsides of the major life transition you are living through is that you have more freedom now than at most points to reinvent your life. (Of course, this is less so if you have children, but even then, you will have choices you can make.) You may find yourself in a situation where you can now choose to live out a long-deferred dream. Perhaps you have wanted to spend a season in the Caribbean or as a ski bum. Perhaps you have wanted to go back to school, either to study an area of interest or to obtain additional credentials as part of a plan to enhance or change your career. Perhaps you can conduct a national job search for that dream job you have been ready for.

We are familiar with the axiom that “God looks at our five-year plans and laughs.” We don’t mean to suggest that any of us gets to plan out our lives without the intervention of chance or fate. Recognizing that element of unpredictability, it is still true that if you don’t know where you are going, it’s awfully hard to get there. If you have a plan, and begin to execute it, it is probably inevitable that you will have to make changes and be flexible. Nevertheless, if you have clearly defined what your goals are, it is more likely that you won’t be completely derailed as life’s unpredictable events occur.

New relationships—and old ones

This is probably as good a place as any to discuss some pretty common phenomena. The first is the “rubber band effect.” Intimate human relationships are just plain hard to analyze or predict. Sometimes a single wrong act or even a single wrong word can be the trigger that irretrievably damages a previously stable long-term relationship. One partner or the other decides he or she has just had enough, goes through a mental door, and doesn’t look back (or at least not too much.) On the other hand, we have seen many relationships that, by any objective standard, simply should not go on, because of severe dysfunction or accumulated toxicity. Nevertheless, these relationships persist and persist. It is more common than you might

think for there to be one or more periods of brief reconciliation followed by another fracture, which is then followed by another cycle of reconciliation and separation...repeated as necessary, either during or after a divorce.

None of us should be surprised at this. After all, you were physically and emotionally attracted to your partner in the first place, and some portion of that attraction likely persists. The only advice we can give about this is twofold—keep your eyes open, and make sure you have and use effective birth control. A post-separation or post-divorce pregnancy will complicate life immensely, and you won't have any control over how your partner chooses to react to that new complication.

Persistent Relationships in Domestic Violence situations

Unfortunately, one of the areas where we most often see clearly unhealthy relationships persist long after they should have been terminated is when there has been ongoing domestic violence. If you have separated from or divorced an abuser, you may well be tempted to return. First, ordinary human patterns, including the “rubber band effect,” will be operating. Second, some of the typical power and control patterns used by abusers have very practical ramifications. Using your children or your finances as leverage, the abuser can make it difficult for you, the victim, to establish independence. Third, the abuser may be now putting on a full court press to get you back. (This may include a charm offensive, or threats, or alternating versions of both.)

It is a domestic violence truism that victims are in the best position to make the best decisions about their own safety, and that may be so. However, we have each seen cases where the decision of a victim to return to an abusive relationship has tragic results. Please, please be very skeptical of an abuser's promises of change or of improved behavior, especially if there is no objective evidence over time of a substantial change in underlying behavior as a result of legal, medical or psychological intervention.

As we noted in Chapter 2, research has shown that the most dangerous time in a domestic violence situation is at separation. If you choose to return to an abusive relationship, and as is far more likely than not, the abuser hasn't really changed, you will be risking further abuse. You will also be exposing yourself to danger if you again decide to leave. In the worst case scenario, this decision can have fatal results.

At a minimum, please, please, discuss your situation with a knowledgeable professional such as your physician, counselor, or an advocate from your local domestic violence project before you act on

an impulse to return to a violent relationship.

A second common phenomenon is the effect of loneliness. Even if you are not tempted at any point to have a physical reunion with your former partner and you split up on relatively good terms, you will likely be tempted to turn to that partner when you need emotional support. This has been your pattern for a period of time, short or long. At stressful moments people are tempted to revert to form. This is where you have to respect the emotional boundary you both need to define. Failing to do so can create various expectations on the part of one partner or the other; these expectations are not likely to be fulfilled.

One other word on this topic—we all know that inhibitions are loosened and judgment impaired by too much to drink or use of drugs, legal or illegal. It also seems to be a general human trait that feelings of loneliness intensify at night. It is the very rare person that wants to hear from an intoxicated former partner at 2:00 a.m. (It is also unwise to assume that your former partner is alone at 2:00 a.m.) If you are hoping to rekindle former bonds of affection, this is not a good way to begin.

There is a third phenomenon that both judges and DNA analysts will tell you is more common than you might like to think, and that is the phenomenon of the “sibling affair.” Again, humans are complex creatures, so perhaps we shouldn’t be too surprised; if you were attracted to a combination of physical and personality characteristics you saw in your former partner, genetic science predicts that it is likely that at least some of those attractive characteristics are shared by one of your former partner’s siblings. Many marriages have been fractured by the discovery that one partner had been having an affair with the other partner’s brother or sister.

It is also very possible that once your relationship with your former partner has been terminated, you will feel free to explore the possibilities of a long-simmering attraction to a brother-in-law or sister-in-law. Life is complicated enough without introducing avoidable intra-family dynamics into it, and neither of us has ever seen a single case where an affair with the brother or sister of a living spouse or a former partner has ended well. (However, we do know of cases where widows or widowers have established happy and lasting relationships with a dead spouse’s sibling.)

On a similar note, any family court judge we have ever discussed this with has agreed on the often uncanny resemblance between a person’s

former partner and the new romantic partner later chosen by that person. (This too, may just be a predictable consequence of our brain's hard-wiring or learned patterns.) The former partner is usually *not* amused by this resemblance, especially if the new partner appears to be a younger version of the former partner. Any advice here is beyond the limits of our expertise, with one exception—once again—*do not* bring the “new and improved” version of your former partner with you to court. If you do, there may be blood, either literally or figuratively.

A last word on this topic—it is very common for people to use their new found freedom to approach a former lover or other “old flame” to see if the spark in that old relationship can be reignited. Sometimes that goes very well indeed. Other times, not so well. Please make sure you are operating in current reality, not simply looking back at the “good old days” with the soft focus of euphoric recall.

Less urgent but perhaps more important—lessons learned

None of us likes to feel lonely, and anyone coming out of a relationship is tempted to avoid that prospect by leaping (sometimes literally) into a new relationship. Psychological professionals and sociologists tell us that these immediate new relationships do not have great odds for long-term success.

Socrates is reputed to have said that “the unexamined life is not worth living.” Whether you choose to try to have a quiet period after the end of a relationship, or if one is forced on you by the lack of a readily available partner, or perhaps most commonly, if the reflective period comes after a relatively brief fling, it is very useful to do what successful managers in businesses and other organizations do after a setback. Once the dust has settled, take some time to engage in a structured and careful assessment of what went wrong the last time, so the pattern won't be repeated in the future.

Douglas Adams, the author of the “Hitchhiker's Guide to the Galaxy” series, once wrote, “Human beings, who are almost unique in having the ability to learn from the experience of others, are also remarkable for their apparent disinclination to do so.” To this, we would add, from our own family court experience, many human beings are also remarkably disinclined to learn from *their own* experience.

Because of the human tendency to spin our own stories and mentally recast them in a light that fits with a generally favorable self-image, many of us do not learn from our own mistakes. Some of those who do

learn are able to do so only with help from therapists, counselors and insightful friends or relatives. Without such outside help, many of those who run the gauntlet of family court will not figure out what they need to do differently.

It is possible that some members of your family or friends are sufficiently objective and courageous to serve as a sounding board for you, but it is more likely that their perceptions of your situation have been shaped by yours. So, this is another situation where the help of a trained and emotionally neutral professional is likely to be of great assistance. We recommend that, at some point following the termination of your marriage or other significant relationship, you at least consider getting the assistance of a trained counselor. This could be a psychologist or psychiatrist, or a person who has a MSW, LCPC or other counseling credential, or a minister who is experienced in pastoral counseling. These professionals can help you develop valuable insights. There are certainly many others, who do not have such formal training, who can serve a similar role, such as a wise friend, or an AA sponsor, or an inspiring spiritual leader, but there is an element of rolling the dice as the intuitive skills of these people have not been measured against any verifiable norms. However well intentioned, an untrained counselor may do more harm than good.

In any event, if you don't consciously identify the patterns in your own behavior that contributed to the ending of your last relationship, it is more likely than not that you will see those same patterns played out in your next relationship.

Alternatively, if a careful retrospective look causes you to identify patterns or habitual behaviors in yourself that are unhelpful to achieving successful relationships, or even self-destructive, you have at least gained the insight that will allow you to choose to change those things, if you want to. Perhaps you won't want to; but this will at least be your choice, and a conscious one.

Achieving peace

All of us want to achieve a sense of spiritual and emotional peace in our existence. Most of us work on that task in one way or another for all of our lives, usually haltingly moving ever-closer to that goal, but never fully attaining it. Having said that, how does one achieve at least a partial sense of peace after the end of an intimate relationship? Our experience with both the people who have been successful and the people who haven't leads us to suggest the following steps for your consideration:

- It may take a while for you to feel “back to normal,” in the sense of establishing a new way of life independent of your former spouse or partner. A few people get there quickly, some more never get there, and most people seem able to construct a new living situation that becomes relatively stable within about a year.
- The people who succeed in achieving peace in their new lives often go about it intentionally, meaning that they engage in the reflection, sometimes with the help of counselors or others that most of us need in order to learn from our experiences and change our patterns for the future.
- Lastly, and most importantly in our view, the people who find peace have a forward-looking mental attitude. They focus on the future instead of the past; they look ahead for new opportunities rather than dwelling on the wrongs—actual or perceived—perpetrated by their former partners or by the family court.

All this sounds easy, but it is very hard. It can be particularly hard to accept losing in court. If you think you “lost” in court, especially around issues concerning your children, you may find it almost impossible to admit that the judge’s decision had some validity. It’s much easier, and it hurts less, to believe that the judge was biased or unfair. You need to know—and you probably know already—that if you allow bitterness to dominate your life, it will consume you and also drive away the people around you.

We have seen more cases than we can count where a party feels aggrieved by being on the short end of a court decision, and promptly makes the situation far worse. Judges refer to this syndrome as “being in a hole and digging furiously.”

One of our favorite books (the citation is fully listed in the bibliography) is “Joint Custody with a Jerk.” This book’s central tenets are that your former partner knows how to push your buttons as well as anyone does or better, and that you were never very successful at changing your partner within your intact relationship (unless your partner was truly willing to change.) If so, you certainly won’t be very able to change your former partner’s behaviors after the relationship has ended. The only thing you have any real control over is you—how you react when your former partner deliberately or carelessly does something that is certain to upset you. You can choose whether to respond in kind, which will escalate the situation, or to re-frame the issue and respond constructively, which at least has the chance of starting a cycle of de-escalation.

Finally, if you want to achieve peace in your own heart, you must yourself become a peacemaker. You will have to forgive the hurts your former partner has caused you (every relationship generates at least some hurts and emotional scars for both parties) and allow that person to forgive you.

All of the major religious traditions recognize the benefit of being generous to others. They all tell us that what goes around comes around. Christ said, “Do unto others, as others do to you.” (Matthew 7:12). The Torah says, “Thou shalt love thy neighbor as thyself.” (Leviticus 19:18). Buddhists and Hindus recognize the reciprocal nature of our actions with others and how our past actions ultimately dictate the quality of our futures through the concept of “karma”—“One who, while himself seeking happiness, oppresses with violence other beings who also desire happiness, will not attain happiness hereafter.” Dhammapada 10 (Violence.) Wiccans know “the threefold rule,” that is, whatever good or ill we intend for others will be returned to us, times three. Muslims are familiar with the prophet’s instruction, “Whoever recommends and helps a good cause becomes a partner therein; and whoever recommends and helps an evil curse shares in its burden.” More recently, the Initial Declaration adopted by the Parliament of World Religions, and signed by representatives of 143 of the world’s religions puts it simply, “We must treat others as we wish others to treat us.”

Acts of kindness are more likely to be repaid with other acts of kindness. Mean spirited acts are almost certain to generate mean spirited responses. This is true everywhere, but is especially true with current or former intimate partners. You can choose to act in ways that you know are certain to cause pain for your former partner. We know that the predictable result will be that your former partner will return the favor. And, the net result is that both parties will be less happy than when they started.

We began this book with a quote from Lincoln’s First Inaugural Address, given when he tried to reach out to people of good faith in the southern states:

“We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break the bonds of affection. ... The mystic chords of memory will yet again swell the chorus of the Union when again touched, as surely they will be, by the better angels of our nature.”

This quote is just as appropriately used as the stepping stone to our

final thoughts. Lincoln's 19th century appeal to the best instincts of his fellow citizens on both sides of a Union that was about to break apart is just as applicable to both sides in a family that is about to break apart in the twenty-first century.

If our book accomplishes anything, it will be to enable you and your partner to make good decisions about staying together or not; and if not, to achieve a graceful disengagement. Our hope is that this book can help, or has helped, both you and your present or former spouse or partner to "look to the better angels" of your natures and to complete what is always a difficult and painful process with your poise, honor, and dignity intact.

Appendices

Appendix A

Financial Worksheets

Worksheet 1 – Assets

Worksheet 2 – Debts

Worksheet 3 – Net Worth

Worksheet 4 – Current Household Budget

Worksheet 5 – Your Temporary Term Budget (Bare Bones)

Worksheet 6 – Your Long Term Budget (Realistic)

Worksheet 7– Partner's Short Term Budget (Bare Bones)

Worksheet 8– Partner's Long Term Budget (Realistic)

You can download these worksheets (in Microsoft Excel format) from:
<http://www.doyourdivorceright.com>

Appendix B

The Rules of Evidence

Why is this Appendix in the book?

The purpose of Appendix B is to explain the “rules of evidence,” which are likely to apply in your divorce case or other family court case. The rules of evidence dictate what evidence the court is allowed to consider. Many people who represent themselves in a divorce case or other family court case discover that the evidence they want to present cannot be accepted. Knowing at least the general evidence requirements will help you avoid being in that situation, and will help assure that your evidence will be accepted.

Some evidence terminology

Evidence: The information, whether contained in the testimony of witnesses in the courtroom or in *exhibits*, such as documents, photos, computer files or other materials that a party presents to a court.

Admitted into evidence: Evidence is *admitted* if the court decides to accept the evidence and consider it in making decisions in the case. Evidence may be admitted *without objection* or over objection, depending on whether the other party agrees that the court can admit the evidence.

Excluded from evidence: Evidence is *excluded* if the court refuses to accept the evidence. Usually evidence is excluded only if the other party objects and the court agrees with the objection.

Sustained: The judge is upholding an objection to evidence.

Overruled: The judge does not agree with an objection to evidence.

Major Evidence Rules and Concepts

All family courts use written rules of evidence to guide judges in deciding what evidence can be admitted in family case. This section discusses the major concepts embodied in those rules. However, the rules of evidence are different from state to state, so reading this section is not a substitute for getting a copy of your court’s rules. Usually they can be found on your state court’s website.

Relevance

Perhaps the most basic rule of evidence is the requirement that what parties present to the court be *relevant*. To be relevant, the information must relate to a contested issue in the case. Not all relevant information will necessarily be accepted by the court for consideration as evidence. For example, even if information is relevant, the court may refuse to consider it because it is *hearsay*, or second-hand information. If information is not relevant, however, the court is likely to decline to consider it, without even addressing the question of hearsay.

Many states adopt the definition of relevant evidence that appears in the Federal Rules of Evidence:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

If evidence is irrelevant, not relevant, it will be excluded from consideration.

Trial judges in all courts, including family courts, have wide latitude in deciding what evidence is and is not relevant. The rules on relevance tend to be enforced more strictly when the case is being presented to a jury. In most states, divorce cases and other family cases are decided by judges without juries. A family court judge might allow parties to present marginally relevant evidence, but might put a strict limit on how much time a party can spend presenting information that really doesn't have much bearing on any of the issues the judge will have to decide. Any judge is likely to refuse to consider evidence that is obviously irrelevant.

Sometimes people representing themselves in family court (and even lawyers) meet resistance from the judge because they want to present information that the judge views as irrelevant. It is fairly common for one party in a family case (with or without a lawyer) to present the court with negative information about the other party. If that information is relevant, the judge may find it persuasive. If it is not relevant, the judge may reject it as meaningless mudslinging, and it may actually hurt the party who is offering it for consideration.

RELEVANCE vs. relevance

One of our colleagues has constructed a very useful matrix for analyzing custody cases. He correctly points out that almost all aspects of a family's life and the character and habits of both parents

are “relevant” to a child custody determination as defined by the relevancy rule. However, relevant does not equal meaningful. He suggests, and we concur, that parties and lawyers should focus on what is Relevant (“big R relevance”) the really important issues, rather than what is relevant (“small r relevance”) attention getting episodes that at the end of the day should not count for much. He correctly observes that lawyers and clients often focus on relevant information that is titillating or exciting but is of little help to the judge in looking at the child’s best interests over 18 years.

Under this analysis, episodic conduct that occurs within the divorce cauldron is classified as “small r relevant”—for example, evidence that one party was three hours late returning the child from visitation last week. On the other hand, habitual and pre-divorce conduct is “big R Relevant”—for example, evidence as to which parent more consistently helped the child with her or his homework before the family was put under the family court microscope.

If you focus your efforts on “big R evidence,” and let the smaller stuff go, you will have a better chance of persuading the decision maker that your position is the right one.

Perhaps the best way to identify what evidence a family court will consider *relevant* is to review your state’s family laws that apply to your case. In many states, the divorce and family laws make it clear what evidence is relevant by spelling out the factors that a judge must consider in making decisions.

In cases involving children, for example, most state laws call for the court’s decisions to be based on the child’s best interest, so any evidence that sheds light on what is in the child’s best interests is likely to be considered relevant. In some states, the laws go on to define specifically what factors must be considered in deciding what is in a child’s best interest—such as which parent has primarily raised the child. Such laws mean that evidence regarding how a child was raised is highly relevant to custody decisions. Similarly, state family laws sometimes define what kinds of evidence must be considered in cases involving issues of property and alimony, such as how much property each party brought into the marriage, and how much each party is capable of earning in employment.

It is therefore important for people representing themselves in family court to be aware of the rules regarding relevant evidence. The issues in a family case define what is relevant and what is not, so people representing themselves in family court need to have a clear understanding of what issues the court intends to focus on.

Here are some examples of how the relevance rule can work in family court:

- A person's criminal history is often not considered relevant in family cases, particularly if the history involves arrests rather than convictions. Under our legal system, which presumes innocence until and unless guilt is proven at trial or admitted through a plea, the fact that someone has been arrested and charged with a crime does not mean the person is guilty. Even criminal convictions may be considered irrelevant, unless they have a clear connection to the people or issues involved in the family case. For instance, the fact that a party has a conviction for child abuse is highly relevant if the family case involves issues regarding children of the parties, but may be irrelevant if the parties have no children together. Similarly, the fact that one party has a past conviction for drunk driving may be relevant (particularly if it is very recent) if that party would be driving with children of the parties in the car, but may not be relevant otherwise.
- In most states, a criminal conviction for a crime involving dishonesty, such as theft or forgery, can be considered regarding the person's credibility as a witness. Some states also allow felony convictions to be considered as reflecting on a witness's credibility. (There may be a limit on how far back in time you can go.) The theory behind these rules is that someone who has been convicted of a crime of dishonesty (or a felony crime) may be less likely to tell the truth as a witness. However, even though such a criminal conviction can be considered as reflecting on a witness's credibility, it doesn't compel the judge to reject or discount the witness's testimony.
- In states that have no-fault divorce laws, a party's adultery or other behavior that may be considered immoral or shameful, but not criminal, is often not relevant to the court's decision on most issues, including visitation with children and financial issues. The simple reason is that family courts have goals other than punishing bad behavior. For instance, if the issue concerns a child, the family court's goal is to serve the best interests of the child; if the issue concerns division of property or alimony, the goal is to be fair and just to both parties.
- On the other hand, in some situations evidence of a party's bad behavior is relevant to one or more of these family court goals. For example, a party's adulterous sexual activity could be highly relevant to a "best interests of the child" determination if the child was somehow exposed to it or significantly affected by it. Similarly, if marital money was wasted on an adulterous affair, that evidence

could be highly relevant to the court's financial decisions.

- Evidence of bad behavior can sometimes be relevant to the issue of whether there are valid grounds for the divorce. For example, in a no-fault state that grants divorces based on irreconcilable differences, if one party opposes the divorce on the ground that the differences can be worked out, that party's bad behavior may be relevant to whether the differences are indeed irreconcilable. In most divorce cases, the parties agree that they should be divorced, even if they agree on almost nothing else. In states where the party seeking a divorce has to prove grounds such as desertion or adultery, evidence of bad behavior may be essential to obtaining the divorce.

The Hearsay Rule

The hearsay rule bedevils pro se litigants and lawyers alike. It is easy to define, easy to understand, but hard to apply because it is qualified by so many exceptions.

Here is the definition of hearsay and the hearsay rule:

Definition: Hearsay evidence is second-hand information that is submitted with the intention that it be taken as true.

Rule: With some exceptions, hearsay evidence cannot be considered by the court.

The word "hearsay" probably originated from witnesses saying, "I *heard* so-and-so say."

To be hearsay, evidence must be based on second-hand information, not on the witness's personal observation, and also must be "offered for its truth," meaning that the court is being asked to take the second-hand information as being true. If either of those ingredients is missing—if the information is first-hand based on the witness's own observation, or if it is second-hand information being offered for some reason other than being true—then it likely is not hearsay evidence.

Example: If a witness said, "I heard Fred say that he saw the blue car go through the red light," that testimony is hearsay and cannot be considered if it is being submitted to prove that the blue car actually went through the red light, or that Fred actually claimed to have seen it go through the red light. However, if it is being offered to prove something else—such as to prove that Fred was able to see or that Fred was able to talk in English—then it is not hearsay, and is admissible for that limited purpose.

The hearsay rule applies to documents as well as to the testimony of witnesses. So, if a party submitted a statement written by Fred, claiming that the car went through the red light, the written statement would be hearsay if it was intended to prove that what Fred had written was true. It would not be hearsay if it was written to prove something else, such as that Fred knows how to write or that he can speak and write in English.

The obvious reason why people representing themselves in family court should know something about the hearsay rule is because the rule can severely limit what evidence the family court can consider. If you need to prove something and you did not see it yourself, you can't count on the court agreeing to consider a written statement from someone else who did see it. Information coming straight from a witness' mouth and based on the witness' own observation is generally more reliable. You need to have your witness come to court and testify.

Notarized Witness Statements

Some people think that if a written statement is notarized, the court will consider it. Not so—in most courts, a written statement can be notarized to the teeth and it still won't be considered if it is hearsay evidence.

Hearsay Rule Exceptions

There are several important exceptions to the hearsay rule that parties representing themselves in court should know, because evidence that would otherwise be excluded from consideration by the court can be considered if it falls within one or more of the exceptions.

The exceptions to the general rule that excludes hearsay evidence from consideration usually involve statements made under conditions that help assure they are reliable. For example, the evidence rules in some states allow deeds and documents at least twenty years old to be considered as evidence even if they contain statements that would be excluded as hearsay. The reason is that such documents present a very low risk of fabrication or unreliability and therefore can be considered. Similarly, records of a business or a government can be considered, even if they include hearsay statements, provided it is proved that they are kept in the usual course of the regular activities of the business or government. Again, the reason is that, if the required proof of how they are kept is made, the records are more likely to be reliable.

Here are some of the major exceptions to the hearsay rule:

Statements by an Opposing Party: A party to any family case can always present evidence of any statement (spoken or written) made by the other party. A party's statement used against them by the other party is called an *admission*. Under the rules, a party's statements, if used against them as admissions, are not hearsay and are not subject to the hearsay rule. Note that this does not mean a party can use their own statements in evidence; statements of a party are admissions only if used *against* that party by the other party.

For example, a witness's testimony that "I heard Fred say he saw the blue car go through the red light" could be admitted into evidence against Fred, if Fred is a party in the court case and the other party called that witness to testify. If Fred is not a party, the statement is likely hearsay, and could not be considered for its truth. It might still be admissible on Fred's credibility, if Fred had previously testified differently.

Yet Another Reason to Think before You Speak, Write and Act
Anything a party in family court says, writes, and does can be used in court by the other party. Every family court judge has seen cases in which parties are humiliated and sometimes disadvantaged by evidence of the thoughtless things they have said, written, and done, but did not truly mean. Abraham Lincoln was in the habit of putting away letters for a while if he had been angry when he wrote them. If we all followed his example, the world would be a better place and fewer people would lose in court because of their own impulsive behavior.

Recorded Recollection: Anything someone wrote down when it was fresh in their mind but that they no longer remember can be introduced into evidence. In family court cases, diaries, calendars and logs are admitted into evidence under this rule. For example, a parent might keep a diary or calendar indicating which parent a child was with on particular days; or when child support payments were made. If the entries were made at the time of the events noted, and if the parent has no memory now of the events, the diary or calendar may be received as evidence, even though it is hearsay evidence.

Two Ways to Qualify Entries in Calendars, Diaries, etc.

There are two ways that entries in diaries, calendars, logs or other reports of past activity can get into evidence. One way is recorded recollection—the entry was accurately made at the time of the event or matter recorded based on first-hand observation, and the maker of

it now has no memory of the event or matter. The other way is for the memory of the maker to be refreshed by reviewing the entry, and then testifying about the event based on refreshed memory. The difference between the two is what comes into evidence. In the first case, the written entry is the evidence; in the second, the testimony of the maker of the entry based on refreshed memory is what comes into evidence.

Records of a Business or Any Other Organization: The records of a business or other organization can be admitted into, even though they are hearsay evidence, if the records meet certain requirements. The rule applies to records of businesses, clubs, government agencies and any other organization that regularly generates and keeps records of its activities. Records include any papers, video and audio tapes, and electronic data files.

In court, business records that qualify under the hearsay exception can be used, not only for the information they contain, but also for what they do not show. The absence of an entry in a business record can be significant. For example, when the records of a state child support collection agency are admitted into evidence, they can prove that payments were made or not made on particular dates.

In many courts, here is what must be shown before the records of a business or other organization will be admitted into evidence:

- The records must be kept in the regular course of the business and the business must have a regular practice of preparing and keeping records of that kind, meaning that records that are specially prepared are likely outside this exception
- The records must contain information transmitted by people with direct, first-hand knowledge of the information. For example, payments on an account must be logged by the person who has first-hand knowledge of the payment being made.
- The keeper of the records or some other authorized person must testify that the records meet the requirements listed above.

Records commonly admitted under this hearsay exception involve such things as a state child support collection agency's records of child support payments. In many states, police reports and reports of criminal investigation are *not* admissible under the business records exception to the hearsay rule even though they may meet all the requirements of the exception. Certain regularly maintained

household records may be admissible as “business records” in some courts—for example, your checking account entries might be admitted as business records to prove payment of bills and other costs.

Excited Utterances: Another hearsay exception involves statements made in the heat of excitement while the speaker is seeing a startling event, or just after. So, a hearsay statement that would ordinarily not be considered can qualify for admission into evidence if the requirements of “excited utterance” are met. The theory behind this exception is that people who describe a startling event while perceiving it or just after are unlikely to be fabricating their statements, so the statements are presumably more reliable than statements made after the excitement has passed.

For example, a witness’s testimony that “I heard Fred say, ‘Oh, my God! The blue car went through the red light and smashed into the green car,’” would ordinarily not be admissible to prove that the blue car ran the red light before striking the green car. However, under the “excited utterance” exception to the hearsay rule, if the witness first testified that Fred seemed excited and blurted out his statement just after seeing the event, Fred’s statement could be admitted to prove that Fred really did see the blue car go through the red light.

State of mind: There is also an exception that will allow statements that are offered to show the speaker’s state of mind rather than for the truth of the statement. For example, if a delusional person thinks that he or she is receiving radio signals from aliens through the fillings in their teeth (don’t laugh, we have heard someone say in court that this was happening) that person’s statement would not be admissible to prove or disprove the existence of alien radio signals, but would likely be admitted to prove that the person had a disordered state of mind.

Sometimes, a judge may allow a child’s statements about one parent or the other into evidence under the state of mind exception. Alternatively, if the judge feels the offered statement is not reliable or probative, it may be excluded even though it does reflect the child’s state of mind.

Certified Public Records: Many states allow various government documents that meet certain requirements to be admitted into evidence, even though they are hearsay, to prove the truth of the information the documents contain. The documents commonly admitted into evidence under this exception include driving records, criminal records and court judgments. Generally, this hearsay exception requires that the government records be certified or

sealed by the government agency, and that the records contain information that the agency is required to collect and report (such as motor vehicle license and accident records maintained by a state registry of motor vehicles).

Commercial and Market Data: Commercial and market information compiled by reliable commercial sources or governmental agencies can also be admitted into evidence under yet another hearsay exception. The evidence most commonly presented under this exception is market and price information about vehicles, boats and other major household or personal items, such as the Bluebook for motor vehicle values. The fact that the information is accepted as evidence does not mean the judge must agree with it.

Catch-all Exception for Evidence that is Trustworthy and Reliable: Some courts have a catch-all exception to the hearsay rule that allows hearsay statements to be considered as evidence if the circumstances under which the statement was made indicate that it is trustworthy and reliable. The theory behind this exception is that the hearsay rule is intended to exclude from consideration unreliable evidence, so if the evidence is reliable, there is no need to exclude it from consideration. If your state includes this catch-all exception in its rule of evidence, you or the other party may succeed in admitting evidence that would not be admitted in other states' courts.

Other Hearsay Exceptions: Most states' evidence rules recognize other hearsay exceptions pertaining to deeds and other real estate records; documents and testimony relating to family history, property boundaries and other historical information. You probably won't need to know these, but if your case involves lots of documents, you may want to review your state's rules.

Rules of Authentication and "Best Evidence":

Proving that "It is What It is."

Other rules regarding documents is that it must be "authentic," meaning that it is what it is supposed to be. Under the "best evidence rule" observed in many states, original documents—receipts, letters, etc.—ordinarily must be used instead of copies, unless the original is unavailable, or unless the parties agree, as they often do, to use photocopies of documents instead of originals. When it comes to government records, such as court judgments, most courts require certified copies, meaning a copy with the stamp or seal of the official who keeps the record, such as the court clerk's seal.

Rules on Children's Testimony

In family court, it is common for parents to want their children to testify, or at least to think that they need their children to testify. Fortunately, in many cases, it turns out not to be necessary for the child to take the witness stand and testify. Often this is because other witnesses (including the parents or a guardian ad litem) can cover in their testimony what the child would have said. Sometimes it is because the judge decides the child is too young to be able to testify in a meaningful way. Sometimes the child winds up not testifying because the parents agree on what the child would say if the child were to testify.^[33]

Some states allow such evidence, especially in criminal cases that include charges of sexual abuse of a child, but in most states, the hearsay rule will exclude statements by a child to others, unless it qualifies under one of the hearsay exceptions, such as the "excited utterance" or "state of mind" exceptions.

Witnesses who have special qualifications and who have questioned or examined the child, such as physicians and counselors, may have some insight as to whether the allegations are valid, but their findings are often inconclusive, and even when conclusive, the findings often amount to little more than educated speculation. In such cases, then, the parent claiming abuse may have no choice except to call the child as a witness to testify.

Different Rules About A Child's Statements to a Parent or Other Adult

Different courts have different rules about admitting a child's testimony. In some states, a parent may be allowed to testify about what a child has told them. In other states, the hearsay rule bars such testimony. If you are representing yourself in court, you cannot necessarily count on being able to repeat what your child has told you, unless the other party does not object or unless the rules of your court allow such testimony as an exception to the hearsay rule.

When children do testify in court, judges often arrange for their testimony to be taken differently than that of adults. For example, a judge might require that all questions for the child be asked by the judge instead of by the parties themselves or their lawyers. That approach can prevent the child from being badgered or intimidated. If both parties have lawyers, a judge might require the parties themselves to leave the courtroom while the child testifies, on the theory that the child is less likely to be inhibited in testifying if the

parents are not listening. If one or both parties do not have a lawyer, the judge likely cannot and will not exclude the parents without their consent. Sometimes parents agree that the judge can speak to the child, off the record, without the parents present, on the theory that the child will feel able to speak more freely in those conditions.

Hearsay Testimony in Child Abuse Cases

Courts in some states do allow adults to testify as to what a child has told them about being sexually or otherwise abused. Other courts have found that allowing such hearsay testimony violates the accused's constitutional right to confront the witnesses against him or her. If your case involves a claim that a child has been abused, you definitely should learn about your state's rules regarding the admissibility of hearsay evidence of the child's statements about the alleged abuse. This particular exception may be contained in your state's laws, not in the rules of evidence.

Rules on Valuation Evidence

In divorce cases, family courts are often called to value the assets and debts of the parties. A family court's divorce decision has to divide marital property and marital debt fairly and reasonably. A fair division is not always an equal division, although many judges divide marital property and debt equally unless there is a reason not to. Once the family court has decided what property owned by either or both spouses is marital, and what debt either or both parties have, the family court has to decide on the value of each item of marital property and the amount of each debt. The court's decision on value has to be based on evidence.

Don't Forget About Evidence of Value of Debts

People who come to family court often forget about proving the value of debts. Often that is because they are focused on proving the value of the property or on other things.

Evidence of the value of a debt is usually easier to prove than the value of property. Bills, account statements and other documents showing what is owed for a debt are good evidence of what a debt is. If you are representing yourself in a contested divorce case, don't forget about the need to prove what you and/or the other party owe. Usually presenting current bills will be enough.

So, if you are representing yourself in a divorce case, you may need to know how to present evidence of the value of your or your spouse's home, vehicles, bank accounts, retirement accounts, major items of furniture and other property. You also may need to present evidence

of the value of debts, because, when the family court decides on the value of property, the court will consider any loans against the property, to come up with a *net value* or *equity value* for the property.

This section explains what evidence is relevant to valuing particular types of property and also how to present that evidence.[\[34\]](#)

The Concept of Market Value: The starting point is to understand what evidence the court will likely consider relevant in deciding the value of property. Family courts usually set the value of property based on evidence of *market value*, which the law defines as the amount that a willing buyer would pay a willing seller for the item in an arms-length transaction.

Sometimes people mistake the asking price or listing price for property as the market value. The fact that a house, a car, or an antique butter churn is listed for sale at a certain price is not evidence of how much it is actually worth, because sellers often set their asking prices unrealistically high.

Weight of Evidence: How much weight the court will assign to value evidence depends on how recent the evidence is; how closely it relates to market value; and how authoritative the evidence is. For example, a five-year-old property tax assessment on a home will likely get less weight than a current real estate appraisal, because the tax assessment is not recent and because the assessed value of real estate is not necessarily a good indicator of market value. A real estate appraisal is more authoritative, meaning it contains an analysis of value that the court can evaluate, whereas a tax assessment shows only the assessor's conclusion as to value, without any indication of what the conclusion is based upon.

The same is true for the value of vehicles and other personal (non-real estate) property. Valuing vehicles is somewhat easier than valuing other property, because there are internet services and books that will provide a value for vehicles. Valuing an appliance, an antique or a family heirloom may be much more difficult. The purchase price is evidence of market value, but if the item was not purchased recently, the court may not give it much weight, particularly if the item has likely depreciated over time. The purchase price of a 15-year-old washing machine, for instance, is likely not a good indicator of its market value today.

Developing the Evidence: When you are developing value evidence to support your case, you should aim for the best evidence you can find

and afford, but keep in mind that some evidence is better than none. If you cannot afford a full-blown real estate appraisal, maybe you can afford something less than that. If you can't afford anything of the kind, use the property tax assessment, the internet value figure, the receipt for the purchase, or whatever other evidence you can find. If you can't locate any evidence at all, the court will probably still allow you to testify as to what you think the item is worth, but the more support you have for your estimate of value, the more likely it is the court will agree with you.

Presenting the Evidence: The hearsay rule may limit your ability to present other people's opinions of value, unless those people are called as witnesses to testify. If one party wants to present a written real estate appraisal as evidence, the court is likely to allow it if the other party agrees. But if the other party objects, the court may refuse to consider the written appraisal as evidence unless the person who prepared and wrote the appraisal is available at court to be questioned by the party. In some courts, even if the appraiser is available to be questioned, the written appraisal itself is not accepted as evidence; instead, the appraiser's testimony about the appraisal is the evidence admitted.

The same principle applies to any valuation evidence that is not your own. Whether it is a value figure for a vehicle printed off the internet, or a value figure for an antique copied from a magazine, your family court's rules of evidence may not allow you to use it if the other party objects. However, if your state allows commercial data and market information to be presented as a hearsay exception, you may be able to convince the court to accept your valuation evidence.

Owner's Opinion of Value: Most courts allow the owner of property to testify as to the market value of the property. In reality, most people who represent themselves in family cases end up giving their own opinions of value, because they cannot afford to hire appraisers and other experts to come to court and testify.

If your family court allows you to state your opinion of the value of property that you own, or that you and the other party own jointly, you should be prepared to support your opinion if the other party questions it. So, for example, if you are stating your opinion of the value of a vehicle, based on the Bluebook value you have located as well as internet valuation services, bring a copy of all your research with you to court. The hearsay rule may prevent the documentation from being considered directly, but you should be allowed to explain what research you did in arriving at your opinion. If you bring the

documents with you to court, you should be able to refer to them in your testimony, and you can use them to support your conclusions if the other party or the other party's attorney questions you about the basis for your valuation opinion.

Here are some examples of evidence to use in proving the value of different kinds of property, and how to present that evidence:

*Home and Other Real Estate:*The best evidence of market value of real estate is a full appraisal performed by a qualified real estate appraiser. Such appraisals often cost well over a thousand dollars, depending on the nature of the property, and it may cost more to have the appraiser testify in court. In divorce cases, it is common for the parties to agree on the value of the marital home and other real estate based on the value developed in an appraisal commissioned by one or both of the parties. If they don't agree, then each party can present its own appraisal through the testimony of a real estate appraiser.

If you cannot afford a full real estate appraisal, you may be able to obtain what is called an "opinion of value" from a real estate appraiser or a real estate agent. An opinion of value usually carries much less weight than an appraisal because it does not include the analysis of market values of comparable properties that full appraisals usually are based upon.

If you don't have an opinion of value, you may rely on the assessed valuation for your property. Property tax assessments are often based on market value, but how reliable the value figure is often depends on how long ago the tax assessor updated the property values.

If the home or land was purchased recently, the closing papers will indicate how much was paid, which is some indication of current market value.

*Value of Improvements to Property:*Whether or not a spouse actually owns property, that spouse may be able to claim compensation for enhancing the value or equity in the property. For example, if the other party owns a home but you paid for the cost of improvements that have increased the value of the home; you can be compensated for your contribution to the value of the property. Similarly, if you have contributed to paying down the mortgage loan balance on a home, you can be compensated for your contribution to the amount of the equity in the home, even if the other party owns the property. Note that your compensation is based, not directly on the amount you paid, although that is relevant, but on the amount by which you have

contributed to the value of or equity in the property. The idea is that, even though you don't own the property, it would be unfair to allow the other party to retain the property without compensating you for your contribution to the value of the other party's interest in the property. Note that if you have benefited from the property, such as by living there rent-free, then your compensation might be reduced by the value of the benefit you received from the property.

Like the value of the property itself, the value of your contribution has to be proved through evidence that the court will accept. Proof through bank records and checks, as well as your own testimony, that you contributed half of the mortgage payment over a five-year period, for example, may entitle you to be compensated for half of the reduction in the mortgage loan balance over that same interval of time. Proof that you paid half of the cost of improvements that enhanced the property's market value by \$10,000 may lead the court to order the other party to compensate you for half of that enhancement, if the property is granted to the other party. Proof of the effect of an improvement on the market value of property may require a real estate appraisal that values the property with, and without, the improvement so as to pinpoint the value of the improvement itself.

Vehicles: The Kelly Blue Book, Edmunds or NADA value for used cars, or any of the internet vehicle valuation services, will guide you as to the value of a vehicle. The original purchase papers may be helpful to document any optional equipment or features on the vehicle. Bear in mind that the hearsay rule may prevent the court from receiving copies of Blue Book pages or internet printouts into evidence, but you should be able to present your opinion as to value, and also to explain what you base it on.

Furniture and Other Personal Property: Household furnishings, particularly furnishings that are not new, are often difficult to value. Antiques can be valued using antique guides. Bear in mind these sources are hearsay, so you may be able to use them only indirectly, by basing your stated opinion of value on them.

Stocks, Investments, Bank Accounts and Other Financial Assets: The best evidence of how much investments such as stocks and mutual funds are worth is the most recent statement from the financial institution that is holding those assets. The same is true for bank checking and savings accounts. To get the most current figures for stocks and mutual funds, you can get daily values off the Internet by going to the financial sections of the websites such as Yahoo and MSN. To value

savings bonds, go to the Federal Government's website: <http://www.savingsbonds.gov>.

Pensions and Other Retirement Assets: It is common for family courts to divide pensions earned during the marriage, on the theory that the pension is a marital asset that should be shared between the spouses. There are two ways to value and divide a pension.

The first way is to award part of the pension to each spouse, so that when pension payments are made, each spouse receives a payment. The proportion of the total pension each spouse receives usually depends on the length of the marriage relative to the years of employment covered by the pension. If the spouses were married before the employment began and stayed married until after the employment ended, then each spouse might be awarded half of the pension. However, if the pension covers 25 years of employment and the marriage only covered 10 of those years, only the 10 year portion of the pension is subject to division by the court and the holder of the pension would not have to share the other 15 year portion of the pension. That 10-year portion usually is awarded half to the party whose employment has generated the pension and half to the other party.^[35]

The other way of dividing a pension is sometimes referred to as the "cash out" approach, because the holder of the pension keeps it, but is ordered to pay the other party for the value of the other party's share. This method requires the current value of the pension to be determined. Sometimes the employer who sponsors the pension can provide this figure, but it can be a complicated calculation. Once the current value is determined, the court decides what portion of the total current value should be awarded to each party. Using the same 25-year pension example, where the marital component of the pension covers ten of the twenty-five years of employment reflected in the pension, the marital component of the pension would be valued at 40% of the total current value of the pension. The other party likely would be awarded half of that 40%. Instead of a QDRO directing how pension payments are made in the future, the court order would require the holder of the pension to make payment of the value of the other party's share, and the holder of the pension would retain full rights to the pension once that payment is made.

This means that if your case involves your or the other party's pension, you may need to present evidence of the terms of the pension and evidence of its current value. The best source of all information about a pension is the employer who is or will be paying on the

pension.

Rules of Evidence on How to Ask Questions

The rules of evidence also cover how to question witnesses. If you are calling or cross-examining witnesses, it is worth understanding these rules.

Ask open-ended questions when questioning your own witness, unless the witness is “hostile.” In most courts, a party (or the party’s lawyer) can ask “leading questions” when questioning the other party or a witness for the other party. But open-ended questions must be used when questioning the party’s own witnesses. The exception comes when the witness is “hostile,” meaning the witness is the other party or someone who is aligned with the other party. Leading questions are allowed to be used for hostile witnesses. An open-ended question is worded so as not to suggest a particular answer. A leading question is worded so it does suggest a particular answer.

For example:

“What color was the traffic light when your car entered the intersection?” is an open-ended question.

“The traffic light was red when your car entered the intersection, wasn’t it?” is a leading question.

The reason for requiring parties to ask open-ended, not leading, questions when questioning their own witnesses is simple. When a friendly witness is asked a leading question, there is a risk that the witness will simply agree with the question, “Yes, the light was red,” instead of answering it based on the witness’s own memory and belief.

The reason for allowing leading questions when a party questions the other party’s witnesses is that those witnesses are less likely to be agreeable and friendly, so the risk that the witness will go along with the question rather than testifying based on the witness’s own memory and belief is low. For this reason, if one party calls the other party as a witness, leading questions are allowed.

Ask leading questions to witnesses for the other party: The court should allow you to ask leading questions—questions that suggest the answer—to witnesses for the other party. Asking open-ended questions to an unfriendly witness is a bad idea, because if given the opportunity, the witness is likely to repeat what he or she said when questioned by the other party, or worse, present new and more damaging testimony. So,

you need to make sure the witness only gives the information you want, not information helpful to the other party.

The way to do that is to ask leading questions, which in some ways are really statements. For example, the question, “You earned \$50,000 from your job last year, didn’t you?” is really a statement, but the addition of “didn’t you?” at the end makes it a legitimate leading question. One of a trial lawyer’s tricks of the trade is to cross-examine the other party’s witnesses through a series of statements in the guise of questions, by adding phrases like “didn’t you,” “isn’t it true” and “correct?” to the beginning or end of the statement. Here are four different ways of asking the same leading question:

“You haven’t paid any child support since January, correct?”

“Didn’t you stop paying child support last January?”

“Isn’t it true you haven’t paid child support since January?”

“You haven’t paid any child support since January, have you?”

Don’t ask any question if you don’t have a specific reason for asking it. Experienced lawyers know that the purpose of cross-examination is to establish points helpful to the case rather than asking witnesses to explain or give information. For this reason, the most effective lawyers cross-examine the other party’s witnesses only when they have some specific point to make. Weaker attorneys and many pro se parties cross-examine without a specific goal in mind, and in the process give unfriendly witnesses the opportunity to do more damage.

Don’t argue with any witness: Another mistake made by pro se parties and some lawyers is asking (what in court are called) argumentative questions. An argumentative question is any question that, instead of soliciting information, simply invites an argument.

For example, “Why are you lying?” is a pointless, argumentative question. The witness is not likely to agree that he or she is indeed lying. Also, it is the judge’s job to decide if a witness is lying or telling the truth. Instead of accusing the witness of lying, you will be much more effective if you prove through evidence that the witness is lying.

Appendix C

Checklist for Divorce Mediation and Divorce Settlement Agreements

The following checklist covers the major topics usually covered in divorce mediation sessions and in divorce judgments. Every case is different, so this list may not cover all topics involved in your case.

Alimony

- Will there be alimony? If not, the agreement needs to state specifically that alimony is waived (given up), and whether the waiver is permanent (forever).
- If alimony will be paid, will it be paid as a lump sum or over time? If over time, how often and for how many months or years will it be paid?
- Whether alimony can be changed, and the circumstances under which it can be changed, or cannot be?
- Will the payor of alimony be covered by life insurance, to secure payment in the event of death?
- What are the tax consequences of alimony? Normally alimony payments are tax deductible for the payor and taxable as income to the payee.
- Will alimony payments terminate early under any circumstances, such the death of the payor or recipient, or the remarriage or cohabitation of the recipient?

Spousal Medical Costs and Insurance

- Will either spouse be arranging for or paying for health insurance coverage for the other? If so, the agreement needs to spell out the details.
- How will un-reimbursed health care expenses be handled? Will either spouse be contributing or covering the other's costs?
- Will payment toward insurance coverage terminate or change based on the death of either spouse, or on the recipient's remarriage or cohabitation?

Property Division

Marital versus non-marital: Usually most of what spouses own at the time of the divorce is owned jointly, meaning together or marital. However, if a spouse brings property into the marriage, inherits, or is given property during the marriage, the property may be non-marital, meaning that one spouse has sole ownership of the property. The agreement should identify what property is non-marital.

Real property: Real property includes the home and any other land or property owned by either party—marital or non-marital.

- What will happen with the home? The agreement should indicate what will happen with the home and any other real estate owned separately or together by either or both spouses.
- If one spouse will keep the property, what is the other spouse required to do to release the property, such as sign a deed?
- If there is any mortgage or other debt on the property, who will be financially responsible? If the party getting the property will be entirely responsible for the debt, is there any obligation to refinance? What is the deadline for refinancing? What happens if the party can't or won't refinance? What happens if the party who did not get the real estate is asked to make payments on the mortgage or other debt?

Personal property, tangible and intangible: Tangible personal property includes every item of property that can be seen and touched, other than real estate, whether owned together or separately. It includes household furnishings, personal effects (such as clothing) of each spouse, and items such as vehicles, boats, collections and everything else.

Intangible personal property includes anything owned by either party that cannot be seen or touched, such as bank accounts and stocks and bonds. It also includes any shares in a business or partnership that doesn't issue stock; retirement assets such as Individual Retirement Accounts, Keogh accounts, 401(k) accounts, pensions and Social Security; life insurance policies and annuities. It can even include such things as frequent flyer points, accrued leave at work, lottery winnings paid over time, and any other items of value owned by either party.

- Who gets what? Will either spouse have to cooperate in signing documents or getting retirement assets transferred?
- Who is responsible for any debt associated with the property, such as

car loans, and what happens if the party who is not responsible has to pay?

- If there are any tax consequences, such as penalties for liquidating retirement assets, how will they be paid?

Omitted property: Sometimes divorce agreements state what happens to property that the parties have failed to include in their agreement. The divorce agreement might say that if either party discovers property of significant value that the other party concealed or did not disclose, the first party can go back to court and ask for the entire division of property to be reviewed to see if it was fairly distributed.

Debt

If there is any debt not specifically mentioned in connection with items of property, such as credit card debt, the agreement needs to indicate who is responsible and what happens if the other party winds up being sued or having to pay on the debt.

Parental Rights and Responsibilities

- How will decisions be made about the children in areas like schooling, health care, religious upbringing and activities? Usually parents share responsibility for decisions, but sometimes one parent is granted all decision making responsibility, or each parent is assigned decision making responsibility in specific areas. Sometimes parents take turns making decisions about things like sports and other activities.
- Will each parent have full access to information about the child's schooling, health care and activities? This is customary, but sometimes a parent's access to information is limited or even prohibited when there is a very compelling reason.
- Are the parents expected to consult and confer on decisions? Usually whichever parent has the child can make emergency medical decisions without consulting the other parent, but the parents must consult on long term decisions.

Child's Residence and Visitation Schedule

- Does one parent have the child most of the time, or do the parents share time more or less equally? For school-age children, it is common for the child to be with one parent during the school week, and with the other parent on at least some weekends, and for substantial time

on school and summer vacations.

- Is the child's schedule specifically defined in terms of days and hours? If the parents get along and can agree, the agreement can say that visitation will be at any reasonable times agreed on between the parents. If the parents have had trouble agreeing, it is usually better for the agreement to spell out the visitation schedule.

Child Support

Every state has laws regarding payment of child support for children under eighteen years of age. Usually one parent has to pay child support in a stated amount to the other parent. Every state sets the amount of support, depending usually on the parents' incomes. The parents can agree to different terms for child support. For example, they might agree that one parent's child support is reduced by the amount the parent pays for private school tuition for the child.

- How much child support will be paid and by whom? How often will it be paid?
- How often will it increase and by how much, or how often can either parent ask for it to be adjusted by the court?
- Will child support end at the time provided by law, or will it continue, and for how long?
- Who will get the tax exemption for the child? Sometimes state law will provide the answers to these questions, but the parents may agree to a different arrangement than the law provides. On the tax exemption, for example, even when state law says that the parent who has the child most of the time gets the exemption, the parents might agree to alternate the exemption. It should always go to a parent who benefits from it, so if one parent has no income, the other parent should ordinarily get the exemption, assuming that person can benefit by it.

Other Child-Related Expenses

Usually one parent will arrange to include the child in health insurance coverage through work, and the other parent will contribute to the cost of covering the child.

- Who will pay for health care expenses—eyeglasses and prescription medications, for example—not covered by insurance?

- If the child has special health care needs, such as mental health counseling, how will the cost be paid?
- Will the parent paying child support be covered by life insurance to secure payment?
- Will either parent be legally obligated to contribute to the cost of college? State law on child support varies on whether parents must pay for college, but the parents can always agree on payment for college even if it is not required by law. One parent's agreement to pay for college might be tied to the other parent's agreement to accept less or no alimony.

Tax Issues

- If the parties have to file tax returns covering tax years before the divorce, will they be filing jointly or separately?
- If they file separately, who takes the tax exemption for children? Who takes the mortgage interest deduction? Sometimes parties agree they will file whichever way saves more money in taxes for both of them.
- If they expect any tax refund, how will the refund be divided?

Miscellaneous Legal Clauses

This section covers important topics not usually discussed at mediation but often covered in divorce judgments and divorce settlement agreements.

Grounds for divorce: In no-fault states, the grounds for divorce are usually agreed to be irreconcilable marital differences. In other states, there may need to be stated grounds such as adultery or abandonment. If you anticipate any disagreement over the grounds for divorce, mediation or marriage counseling may be needed to resolve the disagreement.

Integration clause: This is a sentence or paragraph that states, in effect, that the entire agreement of the parties is contained in the written settlement agreement, meaning that any supposed agreement or understanding that is not included in the written settlement agreement will not be enforced.

Mutual non-harassment provisions: It is not unusual for the parties to agree to leave each other alone, especially if that has been a concern

for either.

Modification: The agreement should indicate how and when it can be modified, and which parts can be modified and which cannot be. A settlement agreement might require at least that any future modification has to be either court-ordered or agreed upon in writing.

Mutual release and indemnification: It is common for divorce agreements to provide that each party is giving up all rights against the other, except for what is spelled out in the agreement. It is also common for parties to agree that they will “indemnify and hold harmless” each other against certain claims by third parties, such as claim by a lender against party for a debt that the other party is responsible for paying.

Rules for interpreting and enforcing agreement: Divorce agreements sometimes indicate which state’s law applies, and sometimes spells out requirements that the parties try to work out disagreements before going back to court. It is also common for agreements to say that whether either party will be reimbursed for legal fees incurred as a result of the other party’s violation of the divorce agreement.

Appendix D

Sample Post-Mediation Settlement Agreement

Here is an example of a mediation agreement that might have been drawn up at mediation, between parents who get along reasonably well and can work out details of scheduling and other things. The parties' lawyers will convert it into a more formal legal agreement, but it contains all the essentials.

The agreement between John and Marsha is as follows:

- John and Marsha will share all decision making for the two children. They will both have full access to all school, medical and other records and information regarding the children. They will schedule and attend parent-teacher conferences separately.
- The parties agree to try to cooperate in parenting. Neither will disparage or criticize the other in the presence of the children, or to the children. If either child is recommended to have counseling, the parents will share the cost equally. Each parent agrees to accept and be bound by the recommendation of the children's primary physician as to whether either of the children needs counseling.
- While school is in session, the children will be with Marsha during the school week and with John the first, third and fourth weekends, from 6:00 p.m. Friday to 4:00 p.m. Sunday. John will pick them up on Friday and Marsha will pick them up on Sunday. They will be with Marsha every second weekend. John can take the children out to dinner any Wednesday night, but must notify Marsha by Tuesday evening whether he plans to do so the next night. While the children are with one parent, they can have full access to the other parent by telephone and e-mail. Each parent will advise the other before taking the children out of state for any reason.
- The parties will alternate February and April school vacations, and will alternate Thanksgiving. Each parent will have the children for half of the Christmas vacation, alternating halves each year and exchanging the children at 11:00 a.m. each Christmas morning. Each parent will have the children for half the summer vacation, but Marsha will have them the last week, so as to be able to get them ready for school.
- Marsha will keep the house and will refinance it within 120 days

after the divorce becomes final so as to remove John from the mortgage. If she does not do so for any reason, John may ask the court to have the house sold. Marsha will be responsible for all maintenance, insurance and other costs for the home, and for the mortgage until it is refinanced. She will send John proof upon request that mortgage payments are being made on time until it is refinanced.

- The parties have agreed to divide the tangible and intangible personal property according to the attached list of items. Each party will keep their retirement assets. The credit card debt will be divided as follows: Marsha will pay the entire VISA bill, and John will pay the American Express bill and the Macy's bill.
- The parties will file their federal and state income tax returns jointly for the previous tax year, so as to maximize tax savings.
- Neither party will pay alimony to the other; and both parties waive their right to alimony at any time in the future.
- John will pay child support according to the schedule required by law. He will make payments every other week. As long as he does not miss a payment, Marsha will not ask for child support to be withheld from his pay check, but may do so if any payments are late by more than two days. Each party will take a tax exemption for one child as long as two exemptions are available. When only exemption is available, they will alternate, beginning with John.
- The divorce judgment will contain standard release language. It will state the divorce is granted on the grounds of irreconcilable differences. Marsha will take back her previous last name.

Appendix E

Web Links to Additional Information

DIVORCE GENERALLY

Here are two of the many websites devoted to providing information and resources on divorce:

<http://www.divorcenet.com/>

<http://www.divorce360.com/>

GENERAL LEGAL INFORMATION

The single best general starting point for information on any and all areas of law:

<http://www.loc.gov/law/help/guide.php>

The Library of Congress; Guide to Law Online

DIVORCE AND FAMILY LAW

http://topics.law.cornell.edu/wex/table_family

Cornell University Law School maintains a data base with links to the family law statutes of all 50 states.

COURTS

http://www.ncsconline.org/D_kis/info_court_web_sites.html#State

National Center for State Courts

A list of all websites maintained by state and county court systems.

CO-PARENTING

<http://www.kidsfirstcenter.org/>

Kids First Center, Portland, Maine maintains a list of services and resources focused on the effects of separation and divorce on children.

<http://www.divorceabc.com/>

National Family Resiliency Center has a website devoted to helping families cope with the changes that come with separation and divorce.

<http://www.uptoparents.org/>

Up to Parents has a website with tools—including video presentations—to help parents reduce family conflict.

MEDIATION

<http://www.acrnet.org>

Association for Conflict Resolution is a national organization that can help you locate a qualified mediator.

<http://www.kscourts.org/programs/alternative-dispute-resolution/Select-a-Mediator.pdf>

The Kansas Court System maintains this guide to selecting a mediator.

DOMESTIC VIOLENCE

<http://www.ncdsv.org/>

The National Center on Domestic and Sexual Violence has a website of helpful resources.

National Domestic Violence Hotline

1-800-799-SAFE (7233) or 1-800-787-3224 (TTY) for a referral to your local agency.

COLLABORATIVE LAWYERING

<http://www.collaborativepractice.com/>

The International Academy of Collaborative Professionals is a group of lawyers, mediators, mental health providers and financial advisers who focus on collaborative divorce and similar dispute resolution methods. It includes a search engine for finding professionals in various locations.

<http://www.divorcenet.com/>

This site includes resources on using collaborative divorce and on finding an attorney who uses collaborative methods

LEGAL ASSISTANCE

To contact the legal services organization in your area, ask your family court clerk or use one of the following web links:

<http://www.lsc.gov/map/index.php> A state by state list of federally funded agencies that provide legal services to low-income clients.

<http://www.lawhelp.org> A state by state list of legal information websites and nonprofit legal services providers.

SELF-REPRESENTATION

http://www.selfhelpsupport.org/help/item.Resources_for_SelfRepresented_Litigants This is a site for professionals who work with pro se litigants, but it includes a list of web links for people representing themselves in court.

<http://www.nolo.com>

A commercial site, but quite comprehensive and helpful. Includes brief summaries of each state's basic family law provisions at:

<http://www.nolo.com/legal-encyclopedia/statearticlegroup-31013.html>

FINDING ATTORNEYS

Most websites that list family law attorneys rely on advertising, so the names listed may or may not represent the family law bar in a particular location. Usually local court clerks, bar associations, and also the word of mouth network, are as reliable a resource as attorney search engines on the Internet. Here are some Internet resources that may prove helpful:

<http://www.afccnet.org/>

The Association of Family and Conciliation Courts (AFCC) is an organization of people in different fields—lawyers, judges, counselors, educators, therapists, financial planners, court administrators—focusing on collaborative approaches to family court.

<http://www.aaml.org/> The American Academy of Matrimonial Lawyers is a professional, by-invitation organization of experienced family law attorneys.

<http://www.abanet.org/legalservices/lris/directory/>

This site, maintained by the American Bar Association, provides links to lawyer referral services in every state.

<http://www.martindale.com/Family-Law-law-firms-countries.htm>

This is an attorney search website maintained by a leading law directory.

<http://www.superlawyers.com/> This is a listing of attorneys who have been recognized for their ability by their peers.

TECHNOLOGICAL HELPS

INTERNET VISITATION

<http://www.internetvisitation.org/index.html>

A website that provides “virtual visitation” using appropriate technology.

<http://distanceparent.org/inetvisit.php>

A site providing tips and tools for long-distance, non-custodial parents.

STRUCTURED COMMUNICATION

<http://www.ourfamilywizard.com/ofw/index.cfm> A commercial site offering a subscription-only service for facilitating and tracking parenting communications, visitation schedules and the like. It can be very useful in high-conflict cases.

Appendix F

Bibliography

I. The Ten Books We Like Best (Listed in the order we would read them)

Mom's House, Dad's House: Making Two Homes for Your Child

(Isolina Ricci, Ph.D., Simon & Schuster, 2nd Edition, 1997)

Child Centered Residential Schedules

(Spokane County Superior Court, 1999)

Available through:

Spokane County Bar Association

1116 West Broadway

Spokane, WA 99260-0030

(509) 477-2665

Joint Custody with a Jerk: Raising a Child with an Uncooperative Ex.

(Julie A. Ross, M.A. and Judy Corcoran, St. Martin's Press, 1996)

Kids First: What Kids Want Grown-ups to Know About Separation and Divorce

(Kids First Center, Tower Publishing, 2008)

Crazy Time: Surviving Divorce and Building a New Life

(Abigail Trafford, Harper Paperbacks [Revised Edition] 1992)

Getting to Yes!

(Roger Fisher, William Ury, and Bruce Patton, Penguin Books, Second Edition, 1981)

The Unexpected Legacy of Divorce: A 25 Year Landmark Study

(Judith S. Wallerstein, Julia M. Lewis, & Sandra Blakeslee, Hyperion,

2001)

Children, Courts, & Custody: Interdisciplinary Models for Divorcing Families

(Andrew I. Schepard, Cambridge University Press, 2004)

Caught in the Middle: Protecting the Children of High Conflict Divorce

(Carla B. Garrity and Mitchell A. Baris, Jossey-Bass Publishers, 1997)

II. The Divorce Process

A. General

Between Love and Hate: A Guide to Civilized Divorce

(Lois Gold, M.S.W., Plume, 1996)

Child Support Survival Guide

(Bonnie M. White and L. Douglas Pipes, Career Press, 1997)

Children of Divorce: A Developmental Approach to Residence & Visitation

(Mitchell Barris and Carla Garrity, Psytec Corp., 1998)

Divorce: The Best Resources to Help You Survive

(Rich Wemhoff, Ph.D., Ed., Resource Pathways, 1998)

The Divorce Culture: Rethinking Our Commitments to Marriage and Family

(Barbara Defoe Whitehead, Vintage, 1998)

For Better or For Worse: Divorce Reconsidered

(E. Mavis Hetherington and John Kelly, W.W. Norton & Co., 2003)

Getting Apart Together: The Couple's Guide to a Fair Divorce or Separation

(Martin A. Kranitz, Impact Publishers, [2nd Edition] 2000)

Getting Divorced Without Ruining Your Life

(Sam Margulies, Ph.D., J.D., Fireside [Revised Edition] 2001)

The Two Roads to Divorce

(Leonardd Marlow, Xlibris Corporation, 2003)

The Unexpected Legacy of Divorce: A 25 Year Landmark Study

(Judith S.Wallerstein, Julia M. Lewis, & Sandra Blakeslee, Hyperion, 2001)

B. Divorce Finance

Divorce and Money: How to Make the Best Financial Decisions During Divorce

(Violet Woodhouse, Nolo Publishing [9th Edition] 2008)

The Dollars and Sense of Divorce

(Judith Briles, Carol Ann Wilson, and Edwin C. Schilling, III, Kaplan Business, 1998)

C. Mediation/Collaborative Divorce

Choosing a Divorce Mediator

(Diane Neumann, Henry Holt & Co., Inc., 1997)

Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life

(Pauline H. Tesler & Peggy Thompson, Harper Paperbacks, 2007)

The Divorce Mediation Handbook

(Paula James, Jossey-Bass, 1997)

Divorce Without Court: A Guide to Mediation & Collaborative Divorce

(Katherine Stoner, Esq., Nolo Press, [2nd Edition] 2009)

A Guide to Divorce Mediation

(Gary J. Friedman, J.D., Workman Publishing, 1993)

D. Self-care

8 Minute Meditation

(Victor Davich, Perigee Books, 2004)

How to Meditate: A Guide to Self-Discovery

(Lawrence LeShan, Little Brown & Co., 1999)

The Relaxation Response

(Herbert Benson, M.D. and Miriam Z. Klipper, Harper Paperbacks,

[Updated Edition] 2000)

The Relaxation & Stress Reduction Workbook

(Martha Davis, Elizabeth Robbins Eshelman, Matthew McKay, and Patrick Fanning, New Harbinger, [6th Edition] 2008)

III. Domestic Violence

The Battered Woman

(Lenore E. Walker, Harper Paperbacks, 1980)

Dangerous Relationships: How to Identify and Respond to the Seven Warning Signs of a Troubled Relationship

(Noelle Nelson, DiCapo Press, 2001)

Defending Our Lives: Getting Away from Domestic Violence and Staying Safe

(Susan Murphy-Milano, Anchor, 1996)

Family and Friends' Guide to Domestic Violence: How to Listen, Talk and Take Action When Someone You Care About is Being Abused

(Elaine Weiss, Volcano Press, 2003)

Getting Free: You Can End Abuse and Take Back Your Life

(Ginny Nicarchy, MSW, Seal Press [4th Edition] 2004)

It's My Life Now: Starting Over After an Abusive Relationship or Domestic Violence

(Meg Kennedy Dugan & Roger R. Hoch, Brunner-Routledge [2nd Edition] 2006)

Men Who Hate Women and the Women Who Love Them: When Loving Hurts and You Don't Know Why

(Susan Forward & Joan Torres, Bantam, 2002)

Next Time She'll Be Dead: Battering and How to Stop It

(Ann Jones, Beacon Press [Revised Edition] 2000)

The Secret of Overcoming Verbal Abuse: Getting Off the Emotional Roller Coaster and Regaining Control of Your Life

(Albert Ellis & Marcia Grad Powers, Wilshire Book Co., 2000)

Stop Domestic Violence: An Action Plan for Saving Lives

(Louis Brown, Meritt McKeon & Francois Dubau, St. Martin's Griffin, 1997)

When Violence Begins at Home: A Comprehensive Guide to Understanding and Ending Domestic Abuse

(K. J. Wilson, Ed., Hunter House, [2nd Edition] 2005)

Why Does He Do That?: Inside the Minds of Angry and Controlling Men

(Lundy Bancroft, Berkley Trade, 2003)

IV. Adjustment to Divorce

But I Didn't Want a Divorce

(Andre Bustanoby, Zondervan Publishing House, 1978)

Crazy Time

See Part I

The New Creative Divorce: How to Create a Happier, More Rewarding Life During - And After—Your Divorce

(Mel Krantzler & Patricia B. Krantzler, Adams Media Corporation, 1999)

The Divorce Book for Men and Women: A Step by Step Guide to Gaining Your Freedom Without Losing Everything

(Harriett Newman Cohen & Ralph Gardner, Avon, 1994)

The Divorce Remedy: The Proven 7-Step Program for Saving Your Marriage

(Michelle Weiner-Davis, Simon & Schuster, 2002)

Divorce & New Beginnings: A Complete Guide to Recovery, Solo Parenting, Co-Parenting, and Stepfamilies

(Genevieve Clapp, Ph.D., John Wiley & Sons, [2nd Edition] 2000)

Divorce Hangover: A Successful Strategy to End the Emotional Aftermath of Divorce

(Anne N. Walther, Tapestries Publishing, 2000)

The Good Divorce: Keeping Your Family Together When Your Marriage Comes Apart

(Constance Ahrons, Harper Paperbacks, 1995)

Healthy Divorce

(Craig Everett and Sandra Volgy Everett, Jossey-Bass, 1998)

Rebuilding: When Your Relationship Ends

(Bruce Fischer, Ed.D and Robert B. Alberti, Ph.D., Impact Publishers, [3rd Edition] 2005)

Should You Leave?

(Peter D. Kramer, Penguin, 1999)

Surviving the Breakup: How Children And Parents Cope With Divorce

(Judith S. Wallerstein, Ph.D. & Joan B. Kelly, Basic Books, 1996)

Too Good to Leave, Too Bad to Stay: A Step-by-Step Guide to Help You Decide Whether to Stay In or Get Out of Your Relationship

(Mira Kirshenbaum, Plume, 1997)

Uncoupling: Turning Points in Intimate Relationships

(Diane Vaughan, Vintage Books, 1990)

V. Child Custody & Cooperative Parenting

The Best Parent Is Both Parents: A Guide to Shared Parenting in the 21st Century

(David L. Levy, Hampton Roads Publishing Company, 1998)

Child Custody: Building a Parenting Agreement That Works: How to Put Your Kids First When Your Marriage Doesn't Last

(Mimi E. Lyster, Nolo Press, [6th Edition] 2007)

Children, Courts, & Custody: Interdisciplinary Models for Divorcing Families

See Part I

Co-Parenting After Divorce: How to Raise Happy, Healthy Children in Two-Home Families

(Diana Shulman, J.D., Ph.D., WinnSpeed Press, 1996)

The Co-Parenting Survival Guide:

Letting Go of Conflict after a Difficult Divorce

(Elizabeth S. Thayer, Ph.D. & Jeffery Zimmerman, Ph.D., New Harbinger Publications, Inc., 2001)

Ex-etiquette for Parents: Good Behavior After a Divorce or Separation

(Jann Blackstone-Ford & Sharyl Lupe, Chicago Review Press, 2004)

Families Apart: 10 Keys to Successful Co-parenting

(Melinda Blau, Perigee Trade, 1995)

The Family Puzzle: Putting the Pieces Together; A Guide to Parenting the Blended Family

(Nancy S. & William D. Palmer with Kay Marshall Strom, Pinon Press, 1996)

Getting Apart Together: The Couple's Guide to a Fair Divorce or Separation

(Martin A. Kranitz, Impact Publishers, [2nd Edition] 2000)

Joint Custody and Shared Parenting

(Jay Folberg, Ed., Guilford Press, [2nd Edition] 1991)

Joint Custody with a Jerk

See Part I

Mom's House, Dad's House

See Part I

Parenting After Divorce: A Guide to Resolving Conflicts and Meeting Your Children's Needs

(Philip M. Stahl, Ph.D, Impact Publishers, 2000)

Parents Are Forever: A Step-By-Step Guide to Becoming Successful Co-parents After Divorce

(Shirley Thomas, Ph.D., Springboard Press, [Revised Edition] 2004)

VI. Children's Issues & Perspectives

Caught in the Middle:

See Part I

Difficult Questions Kids Ask (and Are Afraid to Ask) About Divorce

(Meg Schneider & Joan Zuckerberg, Fireside, 1996)

How to Talk So Kids Will Listen and Listen So Kids Will Talk

(Adele Faber and Elaine Mazlish, Harper Paperbacks, 1999)

Helping Children Cope With Divorce

(Edward Teyber, Jossey-Bass Publishers, [Revised Edition] 2001)

Healthy Divorce

(Craig Everett and Sandra Volgy Everett, Jossey-Bass Publishers, 1994)

Helping Your Kids Cope with Divorce the Sandcastles Way

(M. Gary Neuman, LMHC, Random House, 1999)

Kids First

See Part I

What About the Kids? Raising Your Children Before, During, and After

Divorce

(Judith S. Wallerstein & Sandra Blakeslee, Hyperion 2004)

VII. Parenting After Divorce

A. For Both Parents

Growing Up With Divorce: Helping Your Child Avoid Immediate and Later Emotional Problems (Neil Kalter, Free Press, 2005)

Kids are Nondivorceable: A Workbook for Divorced Parents and Their Children

(Sara Bonkowski, PhD., ACTA Publications, 1987)

See also by same author/publisher: *Teens are Nondivorceable: A Workbook for Divorced Parents and Their Children Ages 12-18*

Tots are Nondivorceable

101 Ways to Be a Long-Distance Super-Dad... or Mom, Too!

(George Newman, Robert D. Reed Publishing, [Revised Edition] 2006)

Questions from Dad: A Very Cool Way to Communicate with Kids

(Dwight Twilley, Tuttle Publishing., 1994_

B. Especially about Teens

How to Deal With Your Acting up Teenager: Practical Help for Desperate Parents

(Robert T. Bayard and Jean Bayard, M. Evans and Co., 1986)

7 Things Your Teenager Won't Tell You: And How to Talk About Them Anyway

(Jenifer Lippincott and Robin M. Deutsch, Ballantine Books, 2005)

Teens are Non-Divorceable

See Part VII, A

C. Especially for Dads

Be a Great Divorced Dad

(Kenneth N. Condrell, Ph.D., St. Martin's Griffin, 1998)

Divorced Dads: Shattering the Myths

(Sanford Brayer, Tarcher, 1998)

The Divorced Dad's Survival Book: How to Stay Connected with Your Kids

(David Knox & Kermit Legett, De Capo Press, 2000)

The Father's Almanac: The Complete and Indispensable Book of Practical Advice, etc.

(S. Adams Sullivan, Main Street Books, [2nd Edition] 1992)

How to Father a Successful Daughter: Reassuring Advice For Fathers to Help Their Daughters Become Happy, Confident Women

(Nicky L. Marone, Backinprint.com, 2007)

D. Especially for Moms

The Courage To Be a Single Mother: Becoming Whole Again After Divorce

(Sheila Ellison, Harper One, 2001)

A Mother's Guide to Divorce: Practical Tips for Women with Children

(Deborah Cantrell, Trafford Publishing, 2003)

The Single Mother's Book: A Practical Guide To Managing Your Children, Career, Home, Finances, And Everything Else

(Joan Anderson, Peachtree Publishers, [2nd Edition] 2004)

E. Especially for Stepfamilies:

How To Win As A Stepfamily

(Emily B. Visher, PhD & John S. Visher, MD, Routledge, 1991)

Stepcoupling: Creating and Sustaining a Strong Marriage in Today's Blended Family

(Susan Wisdom, L.P.C. & Jennifer Green, Three Rivers Press, 2002)

VII. Books for Children

A. Non-Fiction

Growing Up With a Single Parent: What Hurts, What Helps

(Sarah McLanahan and Gary Sandefur, Harvard University Press, 1997)

What in the World Do You Do When Your Parents Divorce? A Survival Guide for Kids

(Kent Winchester J.D. and Roberta Beyer J.D., Free Spirit Publishing, 2001)

The Kids' Book of Divorce: By, For, and About Kids

(Eric Rofes, Ed., & The Unit at Fayerweather Street School, Vintage, 1982)

Mom's House, Dad's House for Kids: Feeling at Home in One Home or Two

(Isolina Ricci, Fireside, 2006)

My Parents Are Divorced, Too

(Melanie, Steven, & Annie Ford and Jann Blackstone-Ford, Magination Press, [2nd Edition] 2006)

This is Me and My Two Families: An Awareness Scrapbook/Journal for Children Living in Stepfamilies

(Marla D. Evans and Rick Schuster, Magination Press, 1988)

B. Fiction (For Very Young Children)

Standing on My Own Two Feet: A Child's Affirmation of Love in the Midst of Divorce

(Tamara Schmitz, Price Stern Stone, 2008)

Two Homes

(Claire Masurel, Candlewick, 2003)

At Daddy's on Saturdays

(Linda Walvoord Girard and Judith Friedman, Albert Whitman & Co., 1991)

Dear Daddy

(John Schindel, Albert Whitman & Co., 1995)

Good-bye, Daddy!

(Brigitte Weninger, North-South Books, 1997)

Dinosaurs Divorce: A Guide for Changing Families

(Laurene Krasny Brown and Marc Brown, Little, Brown & Co., 1988)

Sometimes I feel Like a Mouse

(Jeanne Modesitt, Scholastic Inc., 1996)

Through the Eyes of Children: Healing Stories for Children of Divorce

(Janet R. Johnston, Carla Garrity, Mitchell Baris, and Karen Breunig, Free Press, 1997)

Why are We Getting a Divorce?

(Peter Mayle and Arthur Robins, Harmony Books, [Revised Edition] 1988)

C. Fiction - Middle Childhood

Dear Mr. Henshaw

(Beverly Cleary, Harper Collins, 2000)

The Divorce Express

(Paula Danziger, Puffin, 2007)

It's Not the End of the World

(Judy Blume, Yearling [Reprint Edition, 1986])

D. Fiction - Adolescents

A Solitary Blue

(Cynthia Voigt, Athenaeum, 2003)

Robert Lives with His Grandparents

(Martha Whitmore Hickman, Albert Whitman & Co., 1995)

Waiting For You

(Susane Colasanti, Viking Children's Books, 2009)

About the Authors

Andrew Horton has been a judge since 1999, first on the Maine District Court and now on the Maine Superior Court. He is a former chair and current member of the Maine Family Law Advisory Commission, which advises the Maine Legislature and Judicial Branch on family law matters. He also is a former chair of the Maine Judicial Branch's Domestic Violence Advisory Committee. He earned his undergraduate degree at Harvard and his law degree at Georgetown. He also is an adjunct faculty member at the University of Maine School of Law and an elected member of the American Law Institute. He and his wife have written a legal text, *Maine Civil Remedies*, and he plays guitar in a performing rock band.

John David Kennedy was appointed as a Judge of the Maine District Court in 2002, and sits in the District Courts of mid-coast Maine. He received an A.B. degree from the College of the Holy Cross in 1973, and a J.D. degree from Boston University Law School in 1976. He also completed post-graduate training in negotiation theory and mediation at the *Program on Negotiation* at Harvard Law School in 1995-96. He is also an adjunct faculty member at the University of Maine School of Law. He enjoys restoring and working on old sports cars, and even older boats.

[1] CROSS REFERENCE: See the sidebar in Chapter 2, titled “The Safety Plan.”

[2] “Non-marital” means assets acquired before the marriage, or otherwise not legally treated as “marital,” or joint property. See Chapter 3 for more information.

[3] CROSS-REFERENCE: **Assets & Debts; Net Worth.** Go to Appendix A; Worksheets #1 “Assets”, #2 “Debts”& # 3 “Net Worth”.

Current Household Budget. Go to Appendix A; Worksheet # 4, “Current Household Budget”.

[4] Worksheets 5 and 7 are short term household budget worksheets; 6 and 8 are long-term household budgets necessary to maintain your current standard of living.

[5] CROSS-REFERENCE: **Separate Household Budgets**. Go to Appendix A; Worksheets #5-8 are short and long term budget worksheets for you and your partner.

[6] CROSS REFERENCE: Chapter 3 contains more detail on bankruptcy.

[7] It used to be that a lawyer would have to commit to handle your whole case if she or he agreed to represent you. Most states have changed their bar rules to permit lawyers to provide “unbundled” legal assistance—the lawyer can agree to handle just a portion of the case for a specified fee.

CROSS REFERENCE: Chapter 5 (**Working With Lawyers**) has detail on how to find and hire attorneys.

[8] The “relaxation response” is a physical response to mental calm and controlled breathing. Among other things, blood pressure stabilizes, and a refreshed feeling follows. See “The Relaxation Response” or “How to Meditate” in the Bibliography.

[9] CROSS REFERENCE: See Chapter 7 for more information about mediation.

[10] CROSS REFERENCE: See Appendix C for a **Mediation and Settlement Agreement Checklist**.

[11] Worksheet 4 is a household budget which maintains your current standard of living; worksheets 5 through 8 are short term and long term proposed household budgets.

[12] CROSS REFERENCE: See Chapters 10 and 14 for more information about division of retirement assets.

[13] CROSS-REFERENCE: See Chapter 11 and Appendix B for much more information about the hearsay rule.

[14] CROSS REFERENCE: See Chapters 10 and 11 for much more detail on preparing for a trial. See Appendix B for much more information about the rules of evidence.

[15] See Chapter 11(**How to Present Your Case at Trial**).

[16] See Chapters 10 and 11 for more specific discussions of trial preparation.

[17] CROSS-REFERENCE: See these Additional Resources in the Appendices:

Appendix A: **Financial Worksheets**;

Appendix C: **A Mediation and Settlement Agreement Checklist**;

Appendix D: A sample **Post-Mediation Settlement Agreement**.

[18] CROSS REFERENCE: We explain most of the important terms in sequence here. If there are terms you are not familiar with, refer to the glossary at the front of this book.

[19] CROSS REFERENCE: Refer to Chapter 6 for more detailed information about starting a case.

[20] CROSS REFERENCE: See more information about Mediation in Chapter 7.

[21] CROSS REFERENCE: Chapter 10 provides detailed information on how to prepare for trial.

[22] For much more information about evidence, see Appendix B.

[23] For much more information about the trial process, see Chapter 12 on representing yourself in court.

[24] CROSS REFERENCE: See Chapters 12 and 13 about fixing a judgment or getting it modified.

[25] CROSS-REFERENCE: Refer to Chapter 4 for a detailed description of guardians ad litem and parenting coordinators.

[26] CROSS REFERENCE: For more detail on the pre-trial process, read that section of Chapter 8.

[27] CROSS-REFERENCE: Our section later in this chapter called **Varieties of Trial Scheduling: Know How Your Court Works** discusses the different ways that courts use to schedule family case trials.

[28] CROSS REFERENCE: See Chapter 8, “The Courtroom Code of Conduct” Sidebar.

[29] CROSS REFERENCE: See Appendix B for more on the hearsay rule.

[30] CROSS: REFERENCE: For more information about what to do if the judge takes your case under advisement see Chapter 12.

[31] CROSS-REFERENCE: Motions for reconsideration are not the correct vehicle to deal with a new situation arising after the trial. These issues are usually raised by a motion to modify or amend the existing court judgment; these are discussed in detail in the next Chapter 13.

[32] CROSS REFERENCE: If your situation involves you or the other parent moving away with the child, see our detailed discussion of “relocation cases” in Chapter 4.

[33] For more information about children testifying in court, see the section titled “Calling the Child to Testify as a Witness” in Chapter 4.

[34] CROSS REFERENCE: For more information about division of property see Chapter 4.

[35] CROSS REFERENCE: For more information on Qualified Domestic Relations Orders (QDRO) see Chapter 3, part F.